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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

By JOSEPH S. BOSWORTH,

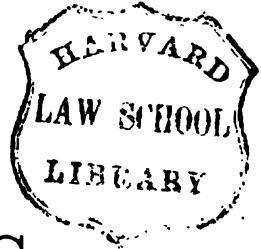
CHIEF-JUSTICE OF THE COURT.

VOLUME V.

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JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

JOSEPH S. BOSWORTH, Ch. J.,	}	Justices.
MURRAY HOFFMAN,		
JOHN SLOSSON, ¹		
LEWIS B. WOODRUFF,		
EDWARDS PIERREPONT,		
JAMES MONCRIEF,		
ANTHONY L. ROBERTSON, ²		

¹ His term of office expired on the 31st December, 1859.

² Elected in November, 1859, for the full term of six years, commencing January 1st, 1860.



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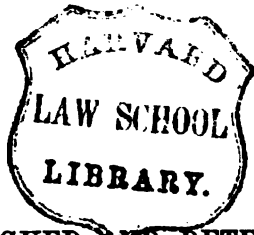
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NOTE.—It is due to the history of these reports and to Mr. JUSTICE WOODRUFF to state, that this volume has been wholly edited by him, excepting the preparation of a part of the cases contained in it.

REPORTER



CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

HOLDANE *et al.*, Plaintiffs and Appellants, v. BUTTERWORTH,
Respondent.

1. Where a person (B.) is in partnership with another (T.) in a business described as the business of "The Atlantic Forge Company," but in which the correspondence is conducted and all contracts made in the name of T., (the name of B. in no manner appearing in the business,) and thereafter the firm is dissolved, and a new partnership is formed by T., the co-partner, and a third person, under a different name, to conduct the same business at the same place, and the partners in such new firm immediately send a notice of that fact signed by them, by post, to all who had dealt with the old firm, and subsequently a vendor who had never dealt with the old firm, makes a sale of goods on credit, nominally, to such former co-partner, T., in whose name the business of the old firm had been done, and takes a note signed by the new firm in its true name, he cannot charge the person, so retiring, as a continuing partner, although he knew by common notoriety that the person so retiring had been a partner, and supposed that he then was, provided it was also a matter of public notoriety, on and after the formation of the new firm, that it had been formed by such co-partner and third person, in a new name, and that it had in fact transacted its business in such new name.

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2. Where the facts specially found entitle a defendant to a general verdict, the plaintiff will not be entitled to a new trial because portions of the charge may have been erroneous, when such portions of the charge could not possibly affect the minds of the jury in considering the evidence relating to or in determining such special facts.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 15; decided, May 14, 1859.

THIS is an appeal by the plaintiffs (John H. and James H. Holdane) from a judgment entered on a verdict in favor of the defendant, (John F. Butterworth,) rendered at a trial had before Mr. Justice SLOSSON and a jury, in March, 1858. Charles H. Tupper and Wesley M. Lee were also named as defendants, but neither of them was served with the summons or appeared in the action.

The complaint states that the defendants on the 10th of October, 1855, were partners "under the name or style of C. H. Tupper, or C. H. Tupper & Lee, at the building usually known as the Atlantic Forge, No. 268 Eleventh street," in New York city.

That on that day the plaintiffs, being partners, composing the firm of Holdane & Co., sold and delivered to the defendants ninety-one pieces of iron, for the price of \$659.22, on a credit of six months, for which the defendants have not paid.

The answer denied the allegations of the complaint.

On the trial it was proved, that for several years prior to March, 1855, the defendants Butterworth and Lee were partners and did business at No. 268 Eleventh street, under the firm name of the Atlantic Forge Company. That Butterworth was its capitalist, but transacted individual business at the Merchants' Exchange, two and a half or three miles distant, and was at No. 268 Eleventh street only occasionally, sometimes once a week, and sometimes not in three or four months. The correspondence of the firm was conducted and its notes and contracts were signed in the name of Charles H. Tupper alone. The name, Charles H. Tupper, at the time of the trial, and for several years previously, was placed conspicuously on a large sign on the top of the building, the whole length of the roof, and the words "Atlantic Forge" were painted conspicuously on the same building.

Tupper & Butterworth did no business after the first of January, 1855; they dissolved partnership prior to March of that

year; on the 1st of March, 1855, the defendants, Tupper & Lee, formed a partnership, under the name of "C. H. Tupper & Lee;" Lee was a man of but little means, and for some time previous had been foreman of the establishment; the new firm conducted its business at the same place, and in its proper name. They sent circulars, dated March 1, 1855, signed with their *names in full*, "by the post, to such parties as had formerly dealt with the house," stating that they had formed such partnership to transact the same business as the Atlantic Forge Company had previously done, and at the same place; and the same fact was also communicated orally to some of those who had formerly dealt with the old firm; no notice of the dissolution of the old firm or of the formation of the new one was published in any newspaper.

It was proved that there was a small tin sign on the front office, before the new firm was formed, which was taken down, and that a new sign was put up, (when the new firm was formed,) having on it the names, "C. H. Tupper & W. M. Lee." That the debts owing in March, 1855, when the firm was dissolved, were paid principally by Butterworth, at his office in the Merchants' Exchange. Butterworth was not in any way interested in the new firm.

The sale of the iron by the plaintiffs was made thus: On the 8th of October, 1855, the plaintiffs sent to C. H. Tupper a note in these words, viz.:

"NEW YORK, Oct. 8th, 1855.

"C. H. TUPPER, Esq.:

"Dear Sir—We have for sale about ten tons faggoting iron, \$55 per ton, 6 months. These are of Ford's make.

"Very respectfully,

"HOLDANE & Co."

Tupper called on the plaintiffs soon, and said he would take the iron, and would send his cart for it. He did so. The plaintiffs charged the iron to C. H. Tupper, and made out and sent with it a bill for it in the name of C. H. Tupper. About a month after the iron was delivered the defendants sent to the plaintiffs a note, dated October 10th, 1855, for the amount of the bill at six months, signed "C. H. Tupper & Lee," which note the plain-

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tiffs produced at the trial and offered to cancel. The plaintiffs were ignorant of Lee's connection with the firm until they received this note. James H. Holdane (one of the plaintiffs) testified that this was the only transaction of his firm with the house doing business at the Atlantic Forge. That as early as 1853 "he learned, and it was generally known in the trade, that Butterworth was a member of the house doing business in Eleventh street;" that he had not heard of his retirement until C. H. Tupper & Lee had failed, in December, 1855, and "supposed" when the iron was sold that Butterworth was a partner. The case does not show whether John H. Holdane, the other plaintiff, was or was not examined. "There was evidence on both sides, on the questions whether or not Butterworth was generally known to be a member of the house, and whether or not it was generally known that a change had taken place in the firm in March, 1855." The plaintiffs objected and excepted to this question being put to Josiah Shove, who was in the employment of the new firm, viz. :

Q. "Was it or not generally known among the dealers of the Atlantic Forge Company or Charles H. Tupper, and the trade generally, that there had been a change in the firm?"

A. "It was."

Being shown a bundle of papers, the same witness stated that they were fourteen letters received by Tupper & Lee from various customers, in different parts of the country, since the 1st of March, 1855, and that all of them were addressed to Tupper & Lee. To the admission of this evidence the plaintiffs excepted.

Butterworth testified that it was not generally known that he was a partner in the business of Charles H. Tupper.

Tupper & Lee, in December, 1855, when they failed, made an assignment to the defendant, Butterworth, for the benefit of their creditors. The judge charged that the plaintiffs cannot recover, if it was not a matter of public notoriety that Butterworth was a member of the prior firm, so that the plaintiffs from that source had, or may fairly be supposed to have had, notice of his connection with the firm.

That they cannot recover, although it was a matter of public notoriety that he was a member of the firm, if the change of the firm on the first of March was also a matter of public notoriety,

or if "such steps were taken by the old or new firm or by Butterworth to make it known, as that the plaintiffs on inquiry might have ascertained it."

But if the change of the firm was not also a matter of public notoriety, or if "no such steps were taken to make it known as that the plaintiffs on inquiry could have ascertained it, then they are entitled to recover."

That as there is no evidence "that Butterworth ever held himself out to plaintiffs, as a member of the firm, and his name not being used in the firm, and the plaintiffs having had no transactions with the firm while he was a member of it; they cannot now charge him as a member of the firm, except on the ground that they may be reasonably supposed to have given credit to the firm in the transaction in question, from the belief induced by the general notoriety of his previous connection with it, that he was still a member, and the absence of a general notoriety of the change of the firm, or of steps taken to make the change known, so that on inquiry they could have ascertained it."

The plaintiffs excepted, severally, to each part of the charge.

The jury found a general verdict for the defendant, and in answer to questions specially submitted to them by the judge, found:

1. That it was a matter of public notoriety that Butterworth was a member of the firm, existing up to the 1st of March, 1855.
2. That it was a matter of public notoriety that the firm was changed on and after that date.

The plaintiffs requested the Court to charge:

1. That if they knew, by general report or otherwise, that for several years prior to the 1st of March, 1855, Butterworth was a partner, the latter was liable unless he proved "that the plaintiffs had notice of his retirement or disconnection before they sold the goods."
2. That it was his duty, either to prove actual notice of such disconnection, to the plaintiffs; or to have published it in some public newspaper in the city of New York; or in some other public and notorious manner put the public on their guard.
3. Unless the defendants had done this, the plaintiffs must recover, unless before selling the goods, they had in some other way obtained knowledge of his retirement.

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4. That knowledge by the plaintiffs, when they sold, of a change of the name of the firm from the Atlantic Forge Company, or Charles H. Tupper to C. H. Tupper & Lee, of itself gave no information to the public concerning the defendant Butterworth; nor had that any tendency to show that he ever was a partner; or if he had been, that he had ceased to be one. The judge refused to charge, in respect to either request, otherwise than as he had charged, and the plaintiffs excepted, *seriatim*, to the several refusals to charge as thus requested.

Judgment having been entered on the verdict, the plaintiffs appealed from it to the General Term.

Thomas Nelson, for appellants.

I. Upon the dissolution of a partnership, the retiring partner, to exonerate himself from liability to the creditors of the continuing firm, for contracts entered into by them subsequent to his retirement, must give notice of his retirement. (Collyer on Partnership, § 530.)

II. As to persons who have been in the habit of dealing with the firm, it is requisite that actual notice be brought home to them. (Collyer on Partnership, § 533; *Clapp v. Rogers*, 2 Kern., 283.)

III. As to all persons who have not had any previous dealings with the firm, a notice in one of the public and regular newspapers published in the place where the business was carried on, is the usual mode of giving information, and should be given to exempt the retiring partner from liability for the future engagements of the continuing firm. (Collyer on Partnership, § 532, and notes, § 534; *Lansing v. Gaine*, 2 Johns. R., 304; *Kitchen v. Clark*, 6 id., 147; *Graves v. Merry*, 6 Cow., 704; *Vernon v. Manhattan Co.*, 17 Wend., 527; 22 id., 193, 198; *National Bank v. Norton*, 1 Hill, 578; *Munn v. Baker*, 2 Stark., 255.)

IV. When a notice of the dissolution has not been published in a newspaper, or brought home to the knowledge of the party to be affected by it, evidence of the mere notoriety of the dissolution is not admissible to prove such notice. (Collyer on Partnership, § 533; *Picher v. Barrows*, 17 Pick., 361; *Gorham v. Thomson*, Peake's C., 42.)

V. A dormant partner is liable after his retirement from the firm, to creditors who knew him as a member of the firm, if they were not notified of his retirement. (*Davis v. Allen*, 3 Comst., 168; *Collmer*, § 536, and note 4; *Kelly v. Hurlburt*, 5 Cow. R., 534; *Evans v. Drummond*, 4 Esp., 90; *Carter v. Whalley*, 1 B. and Ad., 11; *Grosvenor v. Loyd*, 1 Metc., 19; *Farrar v. Deflinne*, 1 Car. and Kir., 580.)

VI. Butterworth, in fact, was not a dormant partner. It is a well settled rule of law that a person is not to be deemed a dormant partner because his name does not appear in the firm and partnership style which they choose to adopt. (*Goddard v. Pratt*, 16 Pick., 428.)

VII. The plaintiffs had no knowledge of the change of the firm at the time they sold their goods; but even if they did, that fact furnished no presumption that Butterworth had ceased to be a partner, if he had not given sufficient notice of his retirement. SHAW, Ch. J., says: "When a business is carried on by three or more partners, and one withdraws, or one is added, or both, and notice thereof given, and the business is carried on as before, those as to whom no notice is given must be presumed to hold the same relation to the concern that they did before, and such change furnishes no presumption that the others have ceased to be partners." (*Howe v. Thayer*, 17 Pick., 95.)

VIII. The giving of the note of C. H. Tupper & Lee to the plaintiffs was no payment of the plaintiffs' claim. (*Davis v. Allen*, 3 Comst., 168; *Vansteenburgh v. Hoffman*, 15 Barb., 28.)

IX. The plaintiffs' several exceptions to the charge made by the court, and its omissions to charge as requested, were well taken.

E. S. Van Winkle, for respondent.

I. The jury found as a fact that it was a matter of public notoriety that Butterworth ceased to be a member of the firm on the 1st of March, 1855.

The plaintiffs had never had any transactions with Butterworth's firm, and months after he had retired from it, sold to parties doing business under a different name a quantity of iron, for which they took the new firm's note at six months.

The old firm was "The Atlantic Forge Company." The new firm "C. H. Tupper & Lee."

Holdane *et al.* v. Butterworth.

There was no error, therefore, in the Judge's charge, that if they found such dissolution to have been a matter of public notoriety, the defendant, Butterworth, was not liable.

Where, on the trial of an action against three persons who had been in partnership together in Liverpool, but one of whom (Humble) had retired, it was proved that, upon his retirement, the new name of the firm was painted upon the counting-house, and the winding up of the affairs of the old partnership was removed to another place in Liverpool, and circular letters announcing the change of partners were sent to the correspondents of the old firm, but there was no public advertisement of the change, nor any notice of it proved which could expressly affect the plaintiffs, the Court of King's Bench held that these circumstances were a sufficient notification to all the world of the change in the firm, and that the action was not maintainable against Humble. (*McIver v. Humble*, 16 East, 169.)

A change of the form of checks in a banking house, is, without any advertisement in the gazette or circular letter to customers, sufficient notice of an alteration of the firm to a creditor who uses such checks. (*Barfoot v. Goodall*, 3 Camp., 147.)

II. The rule is, that actual notice of the retirement of a partner is necessary to be given to the dealers with an established firm, in order to shield the retiring partner from liability for new engagements in the name of the firm, and that as to all other parties a publication in the newspaper is sufficient. But it is not held that such publication is the only means, but that any other facts inferring notice are enough, all the cases, however, have reference to new liabilities in the name of the old firm, not to new liabilities by a new firm or in a new manner, for that alone is notice. (*Godfrey v. Turnbull*, 1 Esp., 371; *McIver v. Humble*, and *Barfoot v. Goodall*, cited above; *Clapp et al. v. Rogers et al.*, 2 Kern., 283; *Vernon v. Manhattan Co.*, 22 Wend., 183; *Graves v. Merry*, 6 Cow., 701; *Ketcham v. Clark*, 6 Johns., 144.)

"Public notice in some reasonable manner must be given." A change in the business name seems the best notice, and one that cannot be overlooked.

See *Parkin v. Carruthers*, (3 Esp., 248,) where La Blanc lays stress on the point that the firm remained the same.

In *Davis v. Allen et al.*, (3 Comst., 163,) "The general principle is, that when a person has done business with another as a member of a firm, or has so publicly appeared as a partner, as to satisfy the jury that the plaintiff must have believed him to be such, and he suffers the plaintiff to continue in and act upon such belief, by omitting to give notice of his having ceased to be a partner after he really had ceased, he will be responsible for the consequences of his original representation uncontradicted by a subsequent notice."

This means that when a person does business with another as a member of the firm, or does business with a firm in which the party has publicly appeared as a partner, so as to induce the dealer to believe he was such, although the plaintiff did not actually transact business with him, then he shall be liable.

The facts of the case and the context show this to be the meaning, and thus construed it is sound law; but if applied in favor of a stranger to dealings with the firm, it is not supported by any authority.

The judgment should be affirmed, with costs.

MONCRIEF, J., delivered a written opinion, which, after stating the facts of the case, proceeds as follows:

Collyer on Partnership, section 530, states the rule to be, that "all the partners may be bound, after the dissolution of the partnership, by a contract made by one partner in the usual course of business, and in *the name of the firm*, with a person who contracted on the faith of the partnership and had no notice of the dissolution. The principle on which this responsibility proceeds, is the negligence of the partners in leaving the world in ignorance of the fact of the dissolution, and leaving strangers to conclude that the partnership continued, and to bestow faith and confidence on the partnership name in consequence of that belief; and where one of two innocent persons must suffer from giving a credit, he who has misled the confidence of the other, and has been the cause of the credit, either by his representation or his negligence or his fraud, ought to suffer instead of the other."

Story on Partnership (§ 160) says: "Unless the ostensible partner, who has retired from the firm, suffers his name still to appear as one of the firm, so as to mislead the public, (as by its

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being stated and still remaining in the firm name,) he will not be liable to mere strangers who have no knowledge of the persons who compose the firm, for the future debts and liabilities, notwithstanding his omission to give public notice of his retirement, for it cannot be said in such cases that any credit is given to the retiring partner by such strangers. Every new creditor or new customer is bound to inquire who are the parties really interested at the time in the firm, if he would be safe in his credit and dealings with them."

All the cases cited in the argument are cases where an ostensible partner is sought to be held liable for a debt contracted in the old firm name, or by a dealer with such firm not having had notice of dissolution.

A *dormant* partner is only chargeable to third persons in respect of contracts entered into by the firm during the time he is actually a partner and is receiving the emoluments and profits of the business, for third persons have never trusted to his credit. The dormant partner is liable during that time, because he is in fact a contracting party, taking a part of the profits of such contracts; but when he ceases to be in fact a partner, the reason ceases, and he is no longer liable. (Coll. on Part., § 536, 3d Am. ed.; 4 Esp., 89; 5 Cow., 534.)

The name of Butterworth never appeared as a member of either firm. He was known to have been the capitalist and interested with Tupper as a member of the firm, doing business in the name of "The Atlantic Forge," and not otherwise. It was as a member of that house one of the plaintiffs had heard of him, and to which he claims to have given credit in this particular transaction. He cannot sustain such a claim, because he gave the credit either to C. H. Tupper, or C. H. Tupper & Lee, and for the reason that he had notice of a change in the name of the firm upon the receipt of the note. He had notice by the new sign with the new firm name thereon. He had notice by the new firm name signed on the note received for the iron. (See 16 East., 169; 3 Camp., 147.) That was a clear, distinct and unmistakable notice. A fair presumption of actual notice can be raised from circumstances that will be sufficient. (1 Smith's L. C., p. 978, old p. 505.) As a matter of fact, it was not disputed that Butterworth was in no wise interested in business at No. 268 Eleventh

street, after March 1, 1855. This transaction occurred seven months afterwards, (in October, 1855.) He cannot be held as a dormant partner, because he was not interested in its profits, and the partnership never did include him. He could not be held liable after his retirement, for the reason that the firm name did not *include* him, though that name had remained the same. (See Coll. on Part., § 536, pp. 488, 489; 1 Barn. & Adol., 11; 5 Cow., 534; Story on Part., §§ 159, 160, &c.; 1 Esp., 182.)

If it be true, as contended by the plaintiffs, that a liability against Butterworth could arise from the fact that he was somewhat generally known, or reputed to have been a partner in business transacted at a particular place, then it should follow as a necessary consequence that his discharge could be shown by the same publicity or notoriety as to his disconnection or withdrawal prior to the making of the contract.

The jury found, as matter of fact, that it was a matter of public notoriety that the firm was changed on and after March 1, 1855; and it seems to me that the plaintiffs would be as much bound to hear what was said by public report or rumor, as they are supposed to see what may be published in a newspaper. Either method of conveying information is somewhat uncertain and dependent upon circumstances materially different from actual notice.

The other exceptions being thus disposed of, in this view of the case, it is unnecessary to consider the particular language of instruction to the jury. Even if erroneous, it could not affect the right of the defendant to judgment.

The judgment should be affirmed, with costs.

HOFFMAN, J. This case has some particularities distinguishing it from the leading authorities upon the subject. The plaintiffs had not in any sense dealt with the old firm, of which Butterworth was a member. He was not then called upon to give actual notice of his retirement to persons who had not had transactions with the firm, much less with himself personally. Nor can the question arise, whether any degree of publicity by newspaper advertisement or circulars, could be, under any circumstances, a substitute for actual notice, as to previous

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dealers. (*Clapp v. Rogers*, 2 Kern., 288; *Vernon v. The Manhattan Co.*, 22 Wend., 183; *Graves v. Merry*, 6 Cow., 701.)

Again, the case is not governed by authorities tending to show that as to subsequent dealers, a publication of a dissolution in newspapers printed in the place of business, would, under certain circumstances, be sufficient. (*Ketchum v. Clark*, 6 Johns. R., 144; *Collyer on Partnership*, § 582 and note.) All that has been urged or cited upon these points appears to us inappropriate.

The case presents these important particulars. It was a matter of public notoriety that Butterworth was a member of the old firm up to the 1st of March, 1855. It is in proof that the plaintiffs heard of his connection with it as early as 1853, and had not heard of his retirement until after December, 1855, the period of the failure of the new firm. One of the plaintiffs swears that he supposed Butterworth was a partner, when the sale of the iron was made. No advertisement of a dissolution was ever published. But the jury have found that it was matter of public notoriety, that the firm was changed after the 1st of March, 1855.

If the head note to *Davis v. Allen*, (3 Comst., 168,) is fully borne out by the decision, it would seem to involve the rule that when once knowledge of an existing partnership is possessed by a party actually, or is to be inferred from notoriety, notice of retirement must be traced to such party, or the partner will continue bound.

But the facts of the case show, that the plaintiff had worked for the firm from 1833 to 1843, and that Child, the defendant, was a partner from 1832 to some time in 1840. The work sued for was performed between the 1st of June and the 26th of November of that year, after the time when Child ceased to be a member.

The Court held that it must be inferred from the facts found by the referee, that Child was known to the plaintiff to have been a partner by direct transactions, or public notoriety. An omission to give notice of retirement was equivalent to a continued representation of his remaining a partner.

"The report necessarily involves a finding that Child was thus known to the plaintiff," that is, as a partner and so known in one mode or the other, by direct transactions, or public notoriety.

Therefore, as the finding may have been that he was actually known, and through direct transactions, to be a member of the firm, the decision may justly be placed upon that ground. It is not a necessary consequence that if the source of information had been nothing but repute, actual notice of retirement would have been equally essential.

In *Farrar v. Defflinne*, (1 Carr. and Kir., 580,) the defendant and one Todd had been in partnership from 1884 to 1887. The defendant was a dormant partner; but much testimony was given to show that the plaintiff had been aware of his being a partner, and had not been made acquainted with the fact of his retirement. That had taken place before the claims sued upon arose. CRESSWELL, J., put it to the jury thus: The question for you is, was this partnership actually known to the plaintiff either by general report or by direct communication? If it was, and he did not know, either from notice of the fact or from surmise, that the dissolution had taken place, you may infer that he still dealt on the faith of the partnership, and the defendant will therefore be liable. The plaintiff had dealt with the firm during the partnership, and afterwards. I think that the phrase "surmise" used by the learned judge may be treated as equivalent to "repute."

Lord KENYON in *Godfrey v. Turnbull*, (1 Esp., 871,) where notice had been given in the Gazette, and the case was of a plaintiff who had not previously dealt with the firm, and the defendant had retired before the bill sued on was given, said: "If the dissolution be notified in the ordinary way, in the only way in which the fact of dissolution can be promulgated, (at least to those who have had no previous dealings with the partners,) it seems sufficient at least to be left to the jury from thence to infer notice."

In the *Tombeckbee Bank v. Dumell & Lyman*, (5 Mason, 56,) it was held that a bill accepted after a dissolution, though drawn before, did not bind a retiring partner, who had announced the dissolution by a public advertisement at the place of business.

Dobbin v. Foster, (1 Carr. and Kir., 323,) was a case in which the retiring partner was originally bound to the plaintiff. Although his retirement was known, there was not enough to show a relinquishment of that original liability.

There is a marked line of distinction between cases of a previous dealing with a firm of which the party to be charged was

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known to be a partner, or of which dealing he received, or might have received a benefit in profits, and cases of a dealing for the first time after the party had retired, and the credit was ostensibly given only to the parties forming the new firm.

When a plaintiff rests only on the common notoriety of a person having been a partner, to make him liable for a contract made after his retirement, an equally common notoriety of retirement or dissolution must be sufficient to exonerate him. If without actual personal knowledge or actual dealing, the ground of notoriety can be presumptively sufficient to fix a responsibility upon a party, the same ground of general repute should operate in his favor, which operates against him. This is the case before us upon the verdict of the jury.

There remains one question. What is the effect of the evidence of one of the plaintiffs, that he supposed Butterworth continued a partner, when the sale of the iron was made?

It is apparent that the danger of receiving such evidence is great, especially since the admission of parties to testify on their own behalf. The defendant in such a case must be defenseless, unless he can prove actual notice of the dissolution brought home to the plaintiff.

The plaintiff, James H. Holdane, has not sworn that he made the bargain in this case, nor is there one word of corroborative evidence tending to show any reliance upon Butterworth's credit.

The judgment should be affirmed, with costs.

BOSWORTH, Ch. J. The proposition is not controverted; that after the dissolution of a firm properly notified, no new contract by the continuing firm can bind the partner who retires.

A notice of dissolution published in the Gazette before a new contract is made, has been held to be an answer to an action by a person having no previous dealings with the firm, whether he saw such notice or not. (Collyer on Part., p. 311, § III, Perkins' 3d ed., § 534.)

"Public notice, in some reasonable and sufficient manner, must be given, and that will conclude all persons who have had no previous dealings with the firm." (*Ketcham & Black v. Clark*, 6 J. R., 148.)

The jury found it was "a matter of public notoriety that the firm was changed on and after" the 1st of March, 1855. The plaintiffs' proposition to sell the iron in question was made by a letter dated the 8th of October, 1855. On the 10th they took for the iron a note made by "C. H. Tupper & Lee," the new firm. The firm of which Butterworth was a member, never did business in that name. When the new firm was formed an old tin sign on the front office was taken down and changed, and a new sign put up with the names "C. H. Tupper & Lee," thereon. Printed circulars stating the dissolution of the old firm and the formation of the new one, and who composed the latter, were sent by post to all who had dealt with the old firm. Butterworth did not appear in the business, nor had he anything to do with it, after the dissolution of the old firm.

Under such circumstances, the fact that the dissolution of the old firm was a matter of *public notoriety*, should protect an outgoing partner, as against a person who never dealt with the old firm, and who, after the lapse of more than six months after the dissolution, sells goods to the new firm, and takes its note therefor, signed in the new firm's name, although he transacted the business with one who had been a member of the old firm.

Public notoriety of the fact of dissolution is sufficient notice to all persons who never dealt with the old firm.

It is an extravagant claim, when made by persons dealing with the new firm after the lapse of months from the time of its formation, and taking the note of the new firm, that the sale was made on the credit of the retiring partner, and on the faith that he was a member of the firm, especially when it is not pretended that he ever did business in that name, but on the contrary it is proved that the name of his firm was entirely different.

I think the facts proved entitled the defendant to a verdict and that the judgment should be affirmed.

Judgment affirmed.¹

¹ Since the above cause was decided, the *City Bank of Brooklyn v. McChesney et al.*, (30 N. Y., 240,) has been decided by the Court of Appeals. The latter case seems to hold that publication of a dissolution of a partnership in a newspaper, is requisite to protect the retiring partner from liability to one subsequently and in good faith taking a note made in the firm's name after such dissolution; although the person so taking it had not been a dealer with the firm, but had knowledge of its prior existence and not of its dissolution.

The reason why notice of the dissolution of a partnership published in "the Gazette in England," has been held a sufficient notice to those who have not dealt with the firm, whether

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SAMUEL G. OGDEN, Jr., Plaintiff and Respondent, v. WILLIAM M. RAYMOND and WILLIAM H. FORBES, Defendants and Appellants.

1. Where, in an action by the indorsee of a note against the makers, the complaint alleges the making by the defendants of a note payable, by its terms, to the International Insurance Company, or order, that such Company afterwards and before its maturity "duly indorsed the said promissory note, and the same was, thereupon, duly transferred and delivered to the plaintiff;" and where the answer merely avers that said Company never had "any legal existence as a corporation," and denies that "it had any legal power or capacity to transfer said note to the plaintiff by its indorsement or otherwise;" the making of the note by the defendants, and its actual and due indorsement and transfer by the Company, are admitted if proof be given of the incorporation of such Company under a charter authorizing it to transfer by indorsement promissory notes which it may own.
2. Under such pleadings the defendants cannot show that the note, with others, amounting in all to over \$1,000, was transferred without a previous resolution of the Board of Directors of the Company authorizing such transfer.

actually seen or not, as stated by Lord ALBANY, C. B., in *Hart v. Alexander*, (7 Carr. & P., 746,) is that "the *Gazette* in England is the usual evidence of a dissolution of partnership, even against persons who are not proved to have read the *Gazette* at all, because a person, not knowing who may trust a firm hereafter, announces his leaving it by an advertisement in the *Gazette*."

It is not intimated that publication of such a notice in any other newspaper, would be equally a protection to the retiring partner.

There is no particular newspaper in the city of New York, in which notices of dissolutions of partnerships are exclusively published, or in which it is expected they may be found. So that publication in a newspaper not taken by a person seeking to charge the retiring partner would not be likely to inform him of the withdrawal of such person from the firm.

If publication in a newspaper, though the publication be not seen and cannot ordinarily be expected to be seen, is to protect a retiring partner, it must protect him on the ground, that such a notice is all that can be reasonably required, by persons who had not dealt with the firm during its existence.

If public notoriety of the dissolution of a partnership and of the formation of a new firm with a new partnership name, will not protect the retiring partner from liability to a person who had no previous dealings with the firm and who subsequently sells goods to the new firm and takes the note of the new firm therefor; then the only ground of exemption would seem to be (no notice of the dissolution having been published in any newspaper) that such person had actual notice of the retirement of the withdrawing partner; and the question of actual notice would seem to be one of fact, to be shown by direct evidence, or by circumstances that would justify a jury in inferring it. (*Hart v. Alexander*, 7 Carr. & P.; 746; *Ketcham & Black v. Clark*, 6 J. R., 146.) "A general notice, by advertisement or otherwise, should be sufficient for those who know the firm only by general reputation." (VINTAGE, Senator, 23 Wend., 194.)

However, much doubt may be created as to the accuracy of the decision in *Holden v. Butterworth*, by the case in 30 N. Y. R., 240; the questions involved are deemed of sufficient importance to justify the reporting of it.

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3. Nor can they under such pleadings show that some of the original subscribers, whose subscription notes were taken as the capital stock on its commencing business, were irresponsible and minors.
4. Nor can they show under such pleadings that the corporation was dissolved and a receiver of its effects appointed, by due judicial proceedings, subsequent to the transfer by the Company of the note thus sued upon.
5. Where, in such an action, and upon such pleadings, the pleadings alleging no other defense except that the note was an accommodation note and was known to the plaintiff to be such when he took it, and that it has been paid from other collaterals transferred with it as security for a loan made to the Company, and where it has been proved that a loan of \$15,000 was made on the security of \$19,000 of collaterals including the note in suit, and that only \$12,000 of the loan has been repaid; it is not error to reject evidence of the whole number of collaterals; or that judgments have been obtained upon some of the collaterals, or of what securities were at any time received for the loan, or were held at the time of the trial.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 12th; decided, May 21st, 1859.

THIS is an appeal by the defendants, (William H. Raymond and William H. Forbes,) from a judgment against them in favor of the plaintiff, rendered on a trial had before Mr. Justice SLOSSON without a jury, on the 13th of May, 1858.

The action is against the defendants as makers of a note, which, with its indorsement, reads thus, viz. :

"\$750.

NEW YORK, October 4, 1855.

"Twelve months after date, we promise to pay the International Insurance Company, or order, for value received, seven hundred and fifty dollars payable at the People's Bank.

(Signed)

"RAYMOND & Co."

[Indorsed.]

"For the International Insurance Company.—M. Starbuck, President."

The complaint alleges the defendants to be partners, under the firm name of Raymond & Co., and that as such, they made and delivered the note to said Company; that the Company afterwards duly indorsed said note before its maturity, and the same was thereupon duly transferred and delivered to the plaintiff; that the note is past due, and no part of it has been paid, and prays judgment for the amount of it with interest.

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The answer denies (an allegation in the complaint) that said Company "is a corporation duly organized under and pursuant to the laws of the State of New York," and avers that it "has not now or ever had any legal existence as a corporation."

It denies that the Company "had any legal power or capacity to transfer said note to the plaintiff by its indorsement or otherwise."

It avers that said note "was loaned to the payee thereof and was and is an accommodation note for which the defendants received no consideration whatever;" that it was given on the agreement that it should not be transferred by indorsement or otherwise, "of all which facts and circumstances" the plaintiff had notice before he took it.

It also alleges that plaintiff claims to hold the note as collateral security for a loan to the Company, and avers that said loan, if ever made, has been paid out of the proceeds of other collaterals placed in his hands, and denies that the plaintiff is the lawful owner and holder, or the real party in interest.

It was proved at the trial by Charles W. Ogden, vice-president of the Company, that the International Insurance Company transacted business as such Company, in the city of New York, from May, 1855, into November, 1856; that Moses Starbuck was President of the Company from the 6th of February, 1856; that the note in suit, with other subscription notes of the Company, amounting in all to about \$19,000, were transferred on the 15th of April, 1856, to the plaintiff's father, S. G. Ogden, to secure a loan of \$15,000, then made by him to the Company, and that only \$12,000 of such loan had been repaid.

That the indorsement of Starbuck's name upon the note was his writing, and that the words over it were written by Leo Del Banco, the Secretary; that the President was in the habit of indorsing the notes of the Company, and that this was known to several of the Directors, and that he "generally, almost universally," indorsed, without there being previous resolutions authorizing the transfers. To the admission of this last named evidence the defendants objected and excepted.

A certified copy of the charter of said Company was read in evidence. The defendants offered in evidence the original minutes of the proceedings of the Company, had on the 20th of

May, 1854, and excepted to the decision of the Court excluding them. They then read the original act of April 15, 1844, an amendatory act passed April 11, 1855, and a resolution of the Company to dissolve, passed February 11, 1853, and moved to dismiss the complaint, and excepted to the decision denying such motion.

Charles W. Ogden, (who was Vice-President from the 9th of October, 1855, until a Receiver was appointed on the 16th of November, 1856,) on his cross-examination, having testified that S. G. Ogden got the note in suit "from the International Insurance Company, he got it 15th of April, 1856," was asked (at folio 8) these questions:

"Q. How did he get it?"

"Q. How many notes were transferred to your father when this was transferred?"

The questions were overruled, and the defendants excepted.

Having testified that S. G. Ogden made several loans to the Company, and "one for \$15,000, on the day the note was transferred," that about \$12,000 of the \$19,000 of securities transferred had been collected, he was asked these questions:

"Q. Have you obtained any judgments on these notes?"

"Q. Was there any resolution of the Board of Directors authorizing that transfer?"

"Q. Did your father make any prior loan to the Company?"

"Q. Did your father at any time receive any other securities from the Company which he could hold as security for this loan?"

"Q. What securities does your father hold now for that indebtedness?"

These questions were severally objected to and excluded, and the defendants excepted. (Folios 11-18.)

The Court excluded evidence upon the question whether there were any losses under a policy which the defendants obtained from the Company about the time the note was given, and the defendants excepted.

The witness having testified to subscriptions, to an agreement to furnish notes as part of the capital stock of said Company, upon condition (among others) "that \$200,000 of subscriptions shall be procured from parties satisfactory to the Company," amounting to over \$284,000, was asked, in substance, (folio 17,)

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whether he did not know that more than \$100,000 thus subscribed was subscribed by office boys in and about Wall street, less than eighteen years old, and that such fact was not known at the time to the officers of the Company?

And whether, at the time the Company went into existence, there were four hundred applicants for insurance, the premiums on which amounted to \$200,000, of which \$40,000 was paid in cash, or notes of solvent parties founded on actual and *bona fide* applications for insurance?

And whether there were notes of solvent parties for \$160,000 founded on *bona fide* applications for insurance, in the hands of the Company at the time they commenced business?

And whether, at that time, the company had a cash capital of \$25,000, and eleven trustees?

These questions, on objection, were severally excluded, and the defendants excepted.

The note in suit being offered in evidence, the defendants objected, *first*, That it is not proved to have been made by the defendants; *second*, That no resolution of the Board of Trustees authorizing the transfer has been proved; and *third*, Nor any by-law authorizing a transfer by the President without a resolution of the Trustees. The objections were overruled, and the defendants excepted.

The witness, on further cross-examination, was asked these questions, viz.:

"Q. Did your father then (when he received the notes) know that there was no resolution of the Board of Trustees authorizing the transfer?

"Q. Do you mean to say that you never knew of a transaction made by the President without the knowledge of more than two or three Trustees?

"A. I know but of one instance, to Mr. Regan, who was a Trustee.

"Q. What was the amount of these notes?"

The two of the last three questions which are unanswered, were excluded, and the defendants excepted.

The plaintiff having rested, the defendants moved for a non-suit, on the grounds, *first*, That the transfer of the note in suit was not authorized by a previous resolution of the Board of

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Directors of the Company; *second*, That it was not indorsed by the Company, nor by the President in office at the time of its transfer to S. G. Ogden. The motion was denied, and the defendants excepted.

William H. Forbes, one of the defendants, testified that he signed the note in question, but was not shown and did not sign any subscription agreement; that the note "was loaned to Mr. Marsh, who was at that time the President of the Company, and loaned to him as the President," without consideration; that "Mr. Marsh promised us that it should remain in the hands of the Company; that he would see that it remained with the Company, and that when the note came due, we should call upon the Company for a check to settle it;" that he said "it was to go to show as part of the capital of the Company; we had an open policy issued to us afterwards; can't say how long afterwards; but the note was issued while we were dealing with the Company;" "we have a claim against the International Insurance Company for losses; the losses were near the amount of the note, but never were adjusted."

Mr. Ogden, being recalled by the defendants, testified thus: "Before the \$15,000 loan was made, I had several conversations about it with my father."

"Q. Did you at that time know the condition of the Company?"

"A. Yes, sir; I communicated it to my father; I told him all I knew about the affairs of the Company; all the notes were in the ordinary form, with two exceptions.

"Q. Did your father know at the time that the parties who signed the notes did not owe the Company the amount expressed in the notes at the time of the transfer?"

This question was objected to and excluded, and the defendants excepted.

Evidence was offered to show that proceedings had been duly taken by the Attorney-General to dissolve said Company; that an order had been entered in them dissolving said Company; that in the course of said proceedings Mr. Scudder was appointed a Receiver of the Company, on the 1st of November, 1856, and that he then notified the defendants not to pay the note in suit to the plaintiff.

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The case states that "the said Judge thereupon found and decided as matters of fact:

"1st. That the International Insurance Company was originally incorporated by a special act of Legislature, passed on the 15th day of April, 1844, by the name of the Kings County Mutual Insurance Company. The original act of incorporation is chapter 156 of the Session Laws of 1844, page 229.

"(To which finding of fact the defendants, in due time and due form of law, excepted.)

"2d. That under that act of incorporation, the Kings County Mutual Insurance Company organized and commenced the business of insurance, pursuant to the act of incorporation, in Brooklyn, shortly after the date of that act, and they thus continued to transact business until the 23d day of May, 1854, when the Trustees and stockholders passed a resolution to dissolve the corporation, and the same was declared by a resolution adopted by the Trustees to have been dissolved, on or about the 11th day of February, 1853, in the following words, viz.:

" 'The ordinary business of this corporation having been suspended for one year, it is resolved, That the corporation is dissolved, and that we, the present Trustees, will settle the affairs of the corporation pursuant to the provisions of the Revised Statutes, sections 9 and 10, first volume, page 603.'

"3d. Afterwards a resolution was introduced into the Board of Trustees of the Kings County Mutual Insurance Company, that the charter of that Company be offered for sale; and after much negotiation, the same was sold to George Briggs and others for the sum of five thousand dollars.

"The facts contained in this and the next preceding finding, are stated by the said Justice, but they were excluded by him. He decided that they were inadmissible in this action, and he rules that they are not to be considered in deciding this action.

"(To which decision the defendants' counsel, in due time and form of law, excepted.)

"4th. That on the 11th day of April, 1855, an act of the Legislature of this State was passed, which is chapter 295 of the Laws of 1855, and is in the Session Laws of that year, at page 505.

"5th. On the 1st day of May, 1855, the International Insurance Company began to transact the business of insurance in

the city of New York, and continued to transact such business until the 16th day of November, 1856, when, in certain proceedings taken by the Attorney-General, pursuant to statute, Henry J. Scudder, Esq., was appointed Receiver of the International Insurance Company, by an order of the Supreme Court.

"6th. That the note declared on, was made by the defendants and delivered to the International Insurance Company.

"7th. It was transferred by the President to Mr. Ogden, together with other similar notes, amounting to about \$19,000. No resolution was adopted by the Trustees or stockholders authorizing such transfer.

"8th. Mr. Ogden advanced \$15,000 on the security of such notes.

CONCLUSION OF LAW.

"That the plaintiff is entitled to recover the amount of the note described in the complaint, with interest.

"(To which ruling and decision of the said Justice, the defendants, in due time and in due form of law, excepted.)"

Judgment having been entered for the plaintiff, the defendants appealed from it to the General Term.

P. Y. Culler, for appellants, (the defendants.)

George W. Stevens, for respondent, (the plaintiff.)

Each counsel made and argued the same points substantially as in *Ogden v. Andre*, reported 4 Bosw., 588.

MONCRIEF, J. The complaint alleges that the defendants as partners made the note, that the payee (The International Insurance Company) duly indorsed it, and that it was thereupon duly transferred and delivered to the plaintiff, and that it is unpaid and became due before suit brought.

1. Denies that the International Insurance Company is a corporation duly organized, and avers that it never had any legal existence as a corporation.

2. Denies that it had any "legal power or capacity to transfer said note by its indorsement or otherwise."

3. It avers that the note was made for the accommodation of the payee, the latter agreeing not to negotiate it, and that these facts were known when the plaintiff took it.

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4. That the loan, as security for which the plaintiff held it, has been fully paid.

The making of the note and its indorsement by the Company are therefore admitted.

The existence of the International Insurance Company as a corporation was sufficiently proved, as against the present defendants.

The remaining matters of defense are, that the note was made to accommodate the Company, that the plaintiff knew this when he took it, that he claims to hold it as security for a loan, and that such loan has been paid. If the loan has not been paid, and if more of it in amount than the face of the note and interest is unpaid, then there is no defense, based on the facts alleged in the answer.

How the minutes of the Company affected any of the issues raised by the answer is left to conjecture merely. The case does not disclose their contents. The rejection of them does not appear to be a matter which could possibly have prejudiced the defendants. The exception to the decision rejecting that evidence is therefore untenable.

The motion to dismiss the complaint was properly denied. No evidence had then been given that the note was made for the accommodation of the payees.

The questions (at folio 8) were only adapted to show that the note in suit, with others, was taken by S. G. Ogden to secure money lent by him, and that the plaintiff took it knowing that fact.

The question whether there was any resolution of the Board of Trustees authorizing the transfer was properly excluded, as the due indorsement of the note by the Company was admitted.

How many securities the lender held is of no moment. The material question is, had the loan been paid? The questions in respect to those matters were properly overruled. It appeared that \$15,000 was lent and only \$12,000 repaid. On this point there is no conflict of evidence. The exceptions (at folios 11-13) are not tenable.

There is no allegation in the answer that the defendants' subscription was procured by fraud, and therefore the evidence offered (at folio 17) tending to show such to be the fact, was properly excluded.

The objection to the reading of the note in evidence, and the exception to the decision admitting it are, for the reasons already stated, untenable.

The evidence admitted, as to what officer was in the habit of indorsing the notes of the Company, was immaterial and in no way prejudicial to the defendants, as the due indorsement of the note by the corporation was admitted by the answer.

As the case stands, and viewing it as one in which no issues were to be tried except those raised by the pleadings, it is simply this:

The defendants are sued as the makers of a note, and the plaintiff sues as indorsee. It is admitted that the payee, which is a corporation, duly indorsed it to the plaintiff, and that it was thereupon duly transferred and delivered to the plaintiff, with this qualification; that the defendants deny that the payee ever had a legal existence as a corporation, or "any power or capacity" to make any transfer of the note.

The payee was created a corporation by a special act, passed in 1844, and after that its name was changed by statute in 1855, and subsequently did business for years as a corporation, and the defendants dealt with it as such. For all the purposes of this action, its existence is fully established, and of course its capacity to indorse and negotiate any note owned by it.

The only other defense set up is disposed of. Although an accommodation note, and known to be so to the first indorsee when he took it, he was a holder for value as he had advanced on its credit and on that of other notes transferred with it \$15,000, only \$12,000 of which has been repaid.

The defendants are therefore liable. The evidence justifies the conclusion that it is a business note, and upon full consideration, by force of the 11th section of the charter of the Company.

The facts as found, do not state whether it was an accommodation note, nor whether the loan had been repaid. But the facts as found, assuming them to be all the facts which the evidence given established, are sufficient, including those admitted by the pleadings, to support the judgment.

I think it should be affirmed.

BOSWORTH, Ch. J., concurred in this opinion.

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HOFFMAN, J. The complaint sets out the making and delivery of the note to the Company; that it was drawn to the order of such Company by name; and that, before maturity, the said International Insurance Company duly indorsed the said promissory note, and the same was thereupon duly transferred and delivered to the plaintiff.

The defendants answer as follows: "And these defendants deny that the said alleged corporation, The International Insurance Company, had any legal power or capacity to transfer said note to the plaintiff, by its indorsement or otherwise."

Thus the allegation of an indorsement by the Company is impliedly admitted; the actual fact of indorsement, by authority of the corporation, through some competent agency, is conceded; and all that is put in issue is, a legal proposition that the Company itself had no legal capacity or power to transfer the note.

Now, the testimony presents this state of facts: The President was proven, by sufficient evidence, to have been in the habit of indorsing the notes; the Finance Committee were made aware of this, as well as several of the other Directors: indeed, the testimony is, that the Finance Committee knew of the transaction with S. G. Ogden upon which this and a mass of other notes were delivered to him.

Yet it is also proven that it was not the custom of the Board to inquire into the financial matters; consequently the Board, as a Board sitting, did not know of the transaction.

Then, a question was put to the witness Ogden, Vice-President of the Company: "Did your father know that there was no resolution of the Board of Trustees authorizing the transfer?" The question was, on objection of the plaintiff, ruled out, and an exception taken.

The 8th section of the act of moneyed corporations, (1 R. S., 588,) is applicable to the present Company. The transfer of effects exceeding the value of \$1,000, without a previous resolution, is void, except to a purchaser for valuable consideration without notice. The notice must be of the fact that there had been no previous resolution. The fact of notice must be positively proven or necessarily inferable from what is proven. And here the defendants offer to prove knowledge by Ogden at the time of the transfer to him, that there was no such resolution.

See the case of *Blunt v. Hanna*, (reported in Cleaveland's Banking System, p. 7, note,) before Vice-Chancellor SANDFORD.

I do not understand that that case, or that of *Gillet v. Phillips*, (8 Kern., 114,) is affected or questioned in any of its positions by the later authorities, except upon the question of a banking corporation, created under the general act, being governed by the provisions as to moneyed corporations. (17 N. Y. R., 521.) Notice of the absence of a resolution of a Board was there chiefly deduced from the situation of the assignee as a Director.

The question, then, seems to resolve itself into this: Has the defendant debarred himself from the defense by the form of his answer?

It is insisted that the answer admits of the construction that the Company had no power to transfer but through a resolution of the Board; that, by this allegation, involved in the denial, they put the plaintiff to prove his title through a resolution, or through something equivalent to and a substitute for it.

But, in our opinion, the language will not justly bear such a meaning. We must construe the answer with reference to the complaint. The allegation is, that the Company duly indorsed the note, and the same was thereupon duly transferred and delivered to the plaintiff.

This fact of indorsement by the Company is met by an averment that the Company had not legal capacity to indorse and transfer the note. The defendant tenders only the issue that there was no such capacity. Presumptively, a corporation has the power to pass away notes held by it, for some purposes; and the transfer will not be assumed to be for illegal purposes. The defendant, therefore, was to show some prohibition, or fact, which destroyed this capacity in the present case. This he has failed to do; and the fact of indorsement by the Company stands conceded.

2. Another branch of the defense taken by the answer is, that the Company was never duly organized, and had not a legal existence.

The charter of the Company was produced in evidence. Proof of acts under it were given. Proof of the defendants' dealing with it as a corporation is given, besides the note itself. Its legal existence is fully made out as against these defendants.

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3. The answer next sets up that the note was an accommodation note to the Company, and this was known to the plaintiff; and, further, that the loan of the plaintiff to the Company has been fully paid.

There is no evidence of Ogden's knowing the character of the note. There is evidence that his loan was not paid. And, in that case, even if he knew it was accommodation paper, there would be no defense on this ground.

The exceptions taken upon the trial remain to be considered.

The defendants' counsel offered to read the minutes of the Company, which was overruled, and an exception taken. In what way these minutes bore upon any issue in the case, does not appear. The counsel did not state in his offer the object of it, nor the contents or tenor of the minutes.

The question was asked, how Ogden got the note from the Company. It was objected to, and the question ruled out, and an exception taken. No question was raised by the answer as to the manner in which Ogden acquired the note from the Company—that it was in an illegal or fraudulent manner. Besides, the question seems fully answered by replies to other questions.

It was asked, how many notes were transferred to Ogden upon the transfer of this note. On objection this was ruled out, and an exception taken. This fact was immaterial to the issue. The only question pertinent to this part of the case was, whether Ogden had been paid in full. Afterwards, the fact is testified to. He got about \$19,000 in notes, of which \$12,000 had been paid.

The question as to the judgments had on any of the notes was equally irrelevant, and so also was the question as to the securities now held by Ogden, and that as to loss under the policy.

The inquiry as to the character of the subscribers to the stock, being office-boys, insolvent, &c., was irrelevant, when there was no allegation in the answer of the subscription of defendants being obtained by fraud.

The extent of capital and number of trustees, were facts equally irrelevant.

The judgment should be affirmed.

Judgment affirmed.

HENRY W. BATES, Plaintiff and Respondent, v. NATHANIEL R. COBB and JAMES H. STEBBINS, Defendants and Appellants.

1. A complaint which states that the defendants, as agents for the plaintiff, purchased stock, and on a settlement of the contract of purchase the vendor was found indebted in a sum specified, for which the vendor gave notes to the defendants as such agents, which they received for the plaintiffs, and which have since been paid to them, and that they refuse to pay over the same to the plaintiff, states facts sufficient to constitute a cause of action, although it does not state how the vendor of the stock did or could become indebted to the vendee.
2. It would, it seems, have been sufficient if it had stated that the defendants, as agents of the plaintiff, on settlement with a third person received a note for the plaintiff which was paid to them at maturity and they refuse to pay over the money.
3. Where a party who claims a balance of account against another, and holds two notes as collateral security, assigns his account to a third person who brings an action thereon and the defendant therein claims to set off one of such notes which had been paid to the assignor, after the assignment but before the suit was brought, and afterwards the suit is settled by the payment of ten per cent of the sum sued for and costs, such settlement is no bar to an action by the defendant therein to recover from the said assignor the amount of the other note, although it was paid pending the former action and before the settlement.
4. A settlement "in full of an account and demand sued upon in this action" does not embrace any matter not embraced in the controversy as disclosed by the pleadings therein.

(Before BOSWORTH, Ch. J., and WOODRUFF, J.)

Heard, November 9th, 1858; decided, May 28th, 1859.

THIS action was tried before William C. Barrett, Esq., Referee, who reported in favor of the plaintiff the sum of \$78.72 with interest from the 25th day of December, 1851, besides his costs, and from the judgment entered upon the report the defendants appealed.

The complaint herein alleged three distinct causes of action, stating them separately.

The defendants introduced their answer by insisting that the complaint did not, particularly in the first and second subdivisions thereof, state facts sufficient to constitute a cause of action, and, reserving the right to move for a dismissal of the complaint

on the trial of the cause, they proceed to answer each cause of action, denying the plaintiff's allegations and also alleging matter in bar.

The Referee reported in the plaintiff's favor for a part only of his first alleged cause of action, and he found for the defendants upon all the other matters in issue.

The first cause of action alleged by the plaintiff (which alone is material to the case on the appeal) is, that the defendants were stock brokers and co-partners; that they were employed by the plaintiff, and under such employment they purchased certain stock; that upon a settlement of the contract of purchase the vendor was found indebted to the defendants as agents for the plaintiff, in the sum of \$314.19, and in payment and settlement of that indebtedness delivered to the defendants, as such agents and brokers for the plaintiff, four promissory notes made by Jacob Little & Co., dated October 23d, 1851, for \$78.72 each, and payable respectively in six, twelve, eighteen and twenty-four months, which notes were received by the defendants in payment of the amount due to the plaintiff on such contract; that such notes were paid to the defendants and they have refused to pay over the money so received to the plaintiff.

The special matter in the answer relating to the cause of action so alleged is, that before the maturity of the said notes, in the complaint mentioned, the plaintiff became indebted to the defendants, and as collateral security for such indebtedness the plaintiff left the notes in their hands, and when the two notes, due respectively at six and twelve months, became due they were paid and credited in account, and that on the 13th of May, 1853, before the other two notes became due, the defendants assigned their account to one Teackle with the collateral securities; that there was then due to the defendants from the plaintiff \$2,582.78; that on the 18th of May, 1853, Teackle brought suit against the plaintiff, which suit was, after issue joined, compromised and settled for a sum about equal to ten per cent on the amount claimed to be due; that Teackle, by virtue of the assignment, became entitled to the notes and that they were paid to the defendants as his agents before such settlement, and were credited on such account against the plaintiff, and that the compromise and settlement was made by the plaintiff with knowledge of

such payment, and that the amount had been credited and applied as aforesaid, and therefore that by means of such receipt and application of the money and the settlement of the said claim, after such receipt and application, the defendants became and are discharged from all liability to account for or pay over the moneys to the plaintiff.

It was shown on the trial that the defendants received the four notes mentioned in the complaint as the plaintiff's agents or brokers in settlement of a balance due to him; that when the first two became due they were paid and it is conceded that they were duly accounted for; that on the 13th of May, 1853, the defendants claiming that the plaintiff owed them a balance of \$2,582.78 in account, on their transactions for him, assigned their account of such transactions to Elisha W. Teackle, who brought an action against the said plaintiff to recover such balance. The plaintiff defended that action upon various grounds not material to the present case, but he also set up in his answer a counter-claim averring that on or about the 23d of April, 1853, the present defendants had also received to the use of the plaintiff (then defendant) the sum of \$78.72, that being the principal sum mentioned in the third of the said four promissory notes, which sum, with interest, he claimed to set off against the claim of the said Teackle as assignee; that action was pending until February 8th, 1855, when it was settled by the payment of ten per cent of the claim of the said Teackle and \$125 on account of the costs of suit, and a receipt was given on behalf of Teackle expressing that the amount was paid and received in full of "the account and demand sued upon" in that action.

During the pendency of that suit the fourth of the above mentioned notes, being also for \$78.72, was on or about the 23d or 26th of October, 1853, paid to the defendants.

The facts found by the Referee, so far as material to the present appeal, are, "That the defendants received the certain promissory note of Jacob Little & Co., mentioned and set forth in the first cause of action, set forth in the complaint in this action as due and payable in twenty-four months after date, for account of the said plaintiff; and that the said note was paid at maturity, and the proceeds thereof were received by said defendants, and that they have never paid or accounted for the same to

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plaintiff; that the said last mentioned note was not embraced in the settlement between plaintiff and said Elisha W. Teackle; that said note was not held by defendants as collateral security, as alleged in the answer; and as conclusions of law from the facts found, the said Referee found that the said plaintiff was not entitled to recover against the said defendants for any part of the amount claimed in the second and third causes of action set forth in the said complaint, or any part of the aforesaid note payable at eighteen months after date; and that said plaintiff was entitled to recover the full amount of the promissory note therein referred to as payable twenty-four months after date, being \$78.72, with interest from the date of the maturity of said note."

To which finding and decision of the Referee the defendants' counsel duly excepted.

Judgment for the plaintiff having been entered upon this decision of the referee, the defendants appealed to the General Term.

J. B. Yates Sommers, for the defendants, (appellants.)

I. The complaint does not state facts sufficient to constitute a cause of action, and, therefore, the Referee erred in denying defendants' motion to dismiss the complaint.

The first count is defective, in not showing how the plaintiff acquired title to the notes, or that he, in fact, had any title. He claims title upon an alleged indebtedness from a vendor to a vendee, when none of the facts stated by him show how such an indebtedness could exist. It might have been sufficient to have averred the existence of the indebtedness without setting forth the facts which gave rise to it; but having set forth the facts, the plaintiff's case must fail, unless those facts justify the conclusion of indebtedness.

II. The defendants were not simply the brokers or agents of the plaintiff. They acted for him not only in that capacity, but also in the capacity of factors—buying and selling and making advances for him, and thus having possession of his property. They transacted his business in their own names, and thus acquired rights beyond those of mere brokers. One of these rights gave them a lien on the property of the plaintiff which came into their hands, for the amount of their commissions,

advances and expenses. (1 Parsons on Contracts, 84; 2 Kent's Com., 640; Story on Agency, §§ 33, 34, 386; *Bryce v. Brooks*, 26 Wend., 368.)

III. The evidence clearly shows that the plaintiff, at the time the defendants received the notes from Little & Co., was indebted to them in an amount far exceeding the amount of his claim in this action, for advances, commissions and expenses. They therefore had a right to collect the notes and apply the amount received towards liquidation of that indebtedness.

1. Such right was incident to the lien which the defendants had upon the property.

2. The complaint virtually admits that the defendants were authorized to collect the notes.

3. The plaintiff himself conceded such right, for he admits that the amount of the two notes which matured before the assignment to Teackle was credited to him in his account with the defendants.

IV. The Referee, therefore, erred in finding as a matter of fact that the defendants had no lien on the notes, and did not hold them as collateral security for payment of the indebtedness of the plaintiff to them.

V. The assignment by the defendants to Teackle of their account against the plaintiff, carried with it the collateral securities in the hands of the defendants, whether they were mentioned in the assignment or not, and therefore all moneys which were collected on the notes after the assignment belonged to Teackle to the extent of the amount due upon the account.

1. Although a lien is in some respects dependent upon possession, it is well settled that a lien may follow goods in the hands of a third person to whom they have been transferred by the party having the lien. It will always follow the property where there is a transfer or assignment of the rights of the party who acquires the lien, for in such cases the transfer operates as a continuance of the possession of the bailee. (*Urquhart v. McIver*, 4 J. R., 115; *Nash v. Mosher*, 19 Wend., 432; Story on Bailments, 216, n. 2; Edwards on Bailments, 210, 211.)

2. The lien of the defendants was a mere incident to the debt, and the assignment of the debt necessarily carried with it all the rights and securities possessed by the assignor. (*Kane v. Blood-Bosw.*—Vol. V.

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good, 7 Johns. Ch., 108; *Green v. Hart*, 1 J. R., 590; *Jackson v. Blodget*, 5 Cow., 206; *Langdon v. Buel*, 9 Wend., 80; *Pattison v. Hull*, 9 Cow., 747; *Curtis v. Tyler*, 9 Paige, 432; *Bowdoin v. Coleman*, 3 Abb., 431; *Parmelee v. Dann*, 23 Barb. S. C. R., 461.)

VI. The settlement of the suit brought by Teackle was a settlement of all the claims of the plaintiff sued for in this action. The referee so finds in reference to all of the demands, except that arising out of the note payable twenty-four months after date. He should have so found in reference to that note for the following reasons:

1. The defendants had, as we have already shown, a lien upon the notes, and held them as collateral security for the balance of account due from the plaintiff.

2. By the assignment of Teackle he became vested with all the rights of the defendants, in reference to the notes, and held them as collateral security for the payment of plaintiff's debt, and had a right to collect them and apply the amount towards its liquidation.

3. The note upon which the plaintiff has recovered judgment matured, and was paid before the settlement, and the amount had been applied by Teackle towards the payment of the debt.

4. In the settlement, the plaintiff expressly reserved certain bank stock which he admitted was held by Cobb & Bates as collateral security, but did not claim the return of any other collaterals.

5. The plaintiff knew when the notes matured, and was aware of the fact that they had been paid before the settlement.

The judgment should be reversed.

Wm. Allen Butler, for the plaintiff, (respondent.)

I. The Referee has found as a fact that the note (No. 4) was not held by defendants as collateral security, as alleged in the answer. This finding, upon the conflicting testimony of the parties, should be conclusive.

The finding of the referee is supported by the weight of evidence.

II. The note in question was not included in the assignment by defendants to Teackle of their account; and, not being, in fact, held as collateral to that account, Teackle acquired no pro-

perty in it, by virtue of the assignment. It was not embraced in the settlement; and the rights of plaintiff against the defendants in respect to the note remained unaffected by his settlement with Teackle. The Illinois Bank stock referred to in the settlement was an item in the account.

III. The fact that defendants afterwards included the note in their general settlement with Teackle is immaterial, and does not in any manner affect plaintiff's rights.

The judgment should be affirmed, with costs.

BY THE COURT—WOODRUFF, J. 1. We are not able to perceive that the first count in the present complaint (upon which alone the plaintiff has recovered judgment) is defective in any substantial particular.

It alleges that the defendants were employed by the plaintiff as his agents to purchase stock for him; that they made such purchase for the plaintiff and on his account; that afterwards, an account of such purchase was stated, and a settlement thereof was made between the vendor and the defendants as such agents, by which the vendor was found indebted to them as such agents in a sum named, which indebtedness such vendor paid by delivering to the defendants, as such agents, four promissory notes of Jacob Little & Co., which notes the defendants received for the plaintiff and held as his agents, and which have been paid to them at their maturity, and that they have not paid over the money received thereon, but refuse so to do.

This is a sufficient statement of facts, showing that the defendants have received money to the use of the plaintiff, which they are bound to pay over to him.

The criticism which the counsel for the appellants applies to this count, is in substance that it does not appear by the allegations how the vendor of stock could or did become indebted to the vendee, and therefore it does not appear that the plaintiff was, at the time of the settlement with the vendor, entitled to receive any notes or money from him, and if not, he could not be entitled to receive any from his agents in the transaction.

Several answers may be given to this objection: *First.* It is averred that the vendor was found indebted and actually paid the notes to the defendants, as his agents, and they received the

notes for him. If so, they are liable to account for them, and for their proceeds; and the particular circumstances which formed the consideration of such vendor's indebtedness, whether his refusal to deliver, or an over-payment of purchase money, or other fact, are quite immaterial. The indebtedness was conceded by such vendor, and the amount was paid to the defendants for the plaintiff's use, and they clearly, upon these facts, have no right to retain it. *Second.* Under our former system of pleading, averments that the parties accounted together of and concerning dealings which they had had together, and on such accounting the defendant was found indebted to the plaintiff in a sum named, which he promised to pay, and yet neglected and refused, &c., were a good statement of a cause of action, without giving the particulars of the dealings or stating how the indebtedness arose. We incline to think such averments would constitute a sufficient complaint now, and much more are averments of such a settlement by the plaintiff's agent with a third person, upon which such agent received money for the plaintiff, good in an action to recover the money from the agent. *Third.* We apprehend that averments that a third person paid money to the defendant as the plaintiff's agent, (or notes upon which the money was paid,) for and on account of the plaintiff, and that such defendant received it for him, but refuses to pay it over, would constitute a sufficient complaint without stating at all the consideration which moved such third person to pay over the money. If it was a mere gratuity, the defendant could not, on that ground, refuse to pay it to the plaintiff.

And finally, if any particulars were desired by the defendant, for the purpose of identifying the transaction and apprising him of the precise nature and ground of the claim, (which, however, does not appear necessary in this case,) he should have sought those particulars by motion for an order to make the complaint more definite and certain, under section 160 of the Code.

2. We do not think it necessary to consider whether the referee erred or not in finding that the defendants had no lien upon the notes in controversy as collateral security; nor whether the assignment made by them to Teackle of their account against the plaintiff, gave Teackle an equitable right to the note which at that time remained in the defendants' hands unpaid. For in

the view we take of the effect of that transaction and the settlement of the action which he brought, no determination of those questions can affect the result of this suit.

The claim of the defendants is that by the settlement with Teackle the plaintiff lost all title to the proceeds of the note now in question.

This claim is clearly no stronger than it would be if there had been no assignment of the defendants' account to Teackle, but the defendants had themselves brought their own action to recover the balance alleged to be due, and he made the same settlement which he made. The case would stand thus :

On the 18th of May, 1858, the defendants sue the plaintiff to recover an alleged balance of account amounting to \$2,582.78. The plaintiff defends on various grounds the entire claim, and alleges that on the previous 23d of April these defendants received the proceeds of the third note, and claims to set off the amount. At this time, although these defendants held in their possession another (and fourth) note belonging to the plaintiff, yet it was not due and it could not be the subject of set-off against the account sued upon. The action so brought and defended is afterwards settled by a payment of a portion of the amount claimed which is received, not in full of all claims and demands, &c., between the parties, but "in full of the *account and demand sued upon.*"

It seems to us hardly possible gravely to insist that this settlement embraced for any purpose anything except the matters alleged in the pleadings in that action, even if its effect can be extended beyond the mere "*account*" of the defendants.

The settlement of that action, under the circumstances stated, operated upon the other relations between the parties just as the payment of the claim in full would have done, by the very terms of the settlement the account and demand sued upon were satisfied. And to that satisfaction nothing was applied except the matters then in controversy and the further payment then made.

It follows necessarily that so soon as the account of the defendants was paid, and in like manner so soon as it was satisfied by the accounting and settlement and the payment made thereon, the present plaintiff was entitled to receive from the defendants whatever property they held belonging to him, (not included in

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the said account nor referred to in that action,) whether the defendants had theretofore had a lien thereon or not. And therefore if the fourth note had not been paid the plaintiff might have demanded the delivery to him of the note itself and might have maintained an action to recover it, for the plain reason that the defendants' lien (if any they once had) was satisfied and extinguished.

The money having been received pending the former suit, and not having been taken into view or embraced in the settlement, was the money of the plaintiff held by the defendants in place of the note itself.

As above suggested, the fact that the former action was prosecuted by the defendants' assignee does not affect this view of the plaintiff's rights. Even if Teackle would have been entitled (had no settlement been made) to require the defendants to pay over to him the proceeds of the note by reason of a supposed lien thereon to cover the balance of the assigned account, still the note never in fact went into his possession. The money was never paid to him. By the settlement all his title to the note and to the money was extinguished if he had any. And the money remained in the defendants' hands to the use of the plaintiff, which the defendants had no right to retain, and upon which Teackle had no claim nor any lien.

The judgment should be affirmed.

Judgment affirmed, with costs.

JOSEPH HOWARD and JOHN T. HOWARD, Plaintiffs, v. THE
ASTOR MUTUAL INSURANCE COMPANY, Defendants.

1. An insurer of passage money, generally for the voyage, by a policy in the usual form of a freight policy, is not liable because the vessel is delayed on her voyage by perils of the sea, if she actually makes the voyage in suitable condition to carry to the port of destination all who embark on the voyage.
2. Insurance of passage money, generally, is not an undertaking that the ship shall perform the voyage within any particular time, or that the insured shall have the benefit of special contracts for passage; but only that the ship shall not be prevented by the perils insured against from making the

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voyage, and earning the passage money of those who embark in her; and that she shall not by a peril insured against be prevented from using her ports and receiving and transporting such persons as have engaged passage and are ready to embark in her.

3. Mere delay of arrival is not ground of recovery from the insurer, although in consequence of such delay those who have engaged and paid in advance for passage at an intermediate port for the residue of the voyage, refuse to wait, and demand and receive back their passage money.

Before SLOSSON, WOODRUFF and PIERREPONT, J. J.

Heard, October 13th, 1858; decided, May 28th, 1859.

THE action was brought on a policy of insurance, dated 14th February, 1850, for \$10,000, on "*passage money*" of the steamship New Orleans, at and from New York to San Francisco, with liberty "*to use*" port or ports, on the passage, and to touch, &c.

An ordinary printed policy on freight was used.

The New Orleans was one of a line of steamers called "The Empire City Line," established in December, 1848, between New York and San Francisco, and was fitted in New York for the passenger trade aforesaid. She was about to leave for Panama, (*via* Cape Horn,) there to take her place in the line, and proceed thence, with passengers, to San Francisco.

Passengers from New York to San Francisco, by steamers, according to the usage and course of business established at the date of the policies, were carried from New York to Chagres, and thence to Panama, and thence were embarked and carried to San Francisco.

When steamers left New York for San Francisco, by the way of Cape Horn, it was the practice to advertise for, and engage passengers in New York, at and from thence to San Francisco, most of whom obtained tickets to embark on board at Panama.

This practice commenced in the year 1848.

The plaintiffs engaged passengers for the New Orleans in the usual manner.

The passage money of the passengers who engaged passage from New York to San Francisco, to be received on board the steamer at Panama, amounted to \$88,550, which was paid, in New York, to the plaintiffs.

These passengers were engaged in the months of January, February, and March, 1850, and upon payment of their passage

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money they received from the plaintiffs, as agents of the line, passage tickets, some of which were in the following form, viz. :

"SECOND CABIN TICKET,

"PACIFIC STEAMSHIP NEW ORLEANS,

"J. HOWARD & SON, AGENTS,

"34 Broadway.

"No. 18.

Voyage 1st.

"Received \$150 for the passage of Nathan Winnett, in the steamship New Orleans, from Panama, *in the month of April*, to the anchorage of San Francisco.

"Second Cabin.

Berth 25.

"J. HOWARD & SON,

"Per J. W. CARRINGTON."

Others of the tickets were in the following form, viz. :

"SECOND CABIN TICKET,

"PACIFIC STEAMSHIP NEW ORLEANS,

"J. HOWARD & SON, AGENTS,

"34 Broadway.

"No. 55.

Voyage 1.

"NEW YORK, January 29, 1850.

"Received \$150 for the passage of Isaac Paddock, in the steamship New Orleans, from Panama, *on her first trip*, to the anchorage of San Francisco.

"Second Cabin forward.

Berth 82.

"J. HOWARD & SON,

"Per J. W. CARRINGTON."

The following announcement was printed on all the tickets, viz. :

"Wines, &c., furnished by the steward, at reasonable rates.

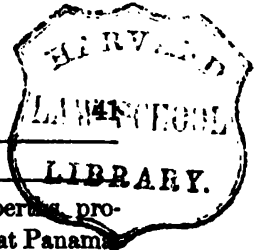
"Ten cubic feet baggage allowed each passenger. Any extra quantity will be charged for. Specie, bullion, nor merchandise, will be taken as baggage.

"Should anything prevent the steamer leaving at the appointed time, the *agents* do not hold themselves, nor the ship, responsible for the maintenance of passengers, nor for loss of time during any detention.

"Passengers not proceeding after taking passage, will forfeit half the amount."

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The New Orleans was fitted by the plaintiffs with berths, provisions, stores, and accommodations for the reception at Panama and the transportation, of the passengers engaged and to be engaged; and on the 25th February she left New York, bound for San Francisco, *via* Panama.

She had on board twenty-five to thirty passengers, whose passage money amounted to \$4,600, of whom ten to twelve were joiners and carpenters.

The vessel encountered heavy weather, and, having been very seriously damaged, was obliged to put into St. Thomas for repairs.

On the 14th of March, 1850, the Captain (J. O. Wood) wrote to the agent of the line in Panama, (B. F. Folger,) informing him of the disaster to the ship, and that he need not expect to see her before June.

This letter was received by Mr. Folger on the 8d or 4th of April.

It had been expected that the steamer would reach Panama during the month of April, and would then receive the passengers and carry them to San Francisco.

Accordingly the passengers arrived at Panama between the 13th and 14th April, 1850, and previously, and 434 of them presented their passage tickets to the agents there.

The New Orleans, after being detained at St. Thomas for about one month, proceeded on her voyage, but met with bad weather and other accidents.

When the passengers learned in Panama of the disaster to the steamer, and that the master did not expect to arrive until the month of June, they became anxious and clamorous, and demanded of the agent the return of the passage money, or that they should be forwarded to San Francisco by other vessels.

Folger did not think she would arrive until July, and she did not, in fact, reach Panama until the 23d of August.

After the expiration of the month of April, Folger began to make arrangements to forward the passengers, or to refund to them their passage money.

In the months of May and June a number of the passengers were forwarded in sailing vessels, of which Garrison & Fritz were the agents, they having agreed to receive the passage tickets of the New Orleans in payment, upon the promise of Mr. Folger

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that the sums specified in these tickets should be paid to them by J. Howard & Son.

The aggregate of the passage money specified in the tickets taken by Garrison & Fritz amounted to \$38,250, and, together with the passage money refunded directly to others of the passengers, (\$5,650,) amounted to \$43,900, which amount was paid to them by Folger on account of the plaintiffs.

On or about the 19th June, Mr. Folger engaged passage for, and sent the remainder of the passengers (123) by the steamer *New World*, engaging to pay \$300 for each passenger, giving the tickets by the *New Orleans* in part payment.

The plaintiffs paid for the passage of the last mentioned passengers \$36,900.

Many of the passengers were in a destitute condition at Panama, and Mr. Folger, in order to provide them with the necessaries of life, advanced to, and paid them about \$1,310.

The cost of maintaining the passengers at Panama from their arrival until the 23d of August, would have been from \$10 to \$12 per week for each passenger.

When the *New Orleans* finally reached Panama, there were none of her passengers left at that place, but she engaged and carried to Panama, others, whose passage money amounted, in the aggregate, to \$15,275.

The whole amount of insurance in several offices, including the defendants, was \$62,500, and the amount of passage money received at New York in advance for passages from Panama was \$88,550, and for passage money from New York around the Cape \$4,600.

It is unnecessary to state the pleadings at length. The plaintiffs claimed to recover the full amount of the policy, \$10,000, with interest, as for a total loss of passage money. The defendants denied their liability, on various grounds, which appear in the points of their counsel on the argument in the General Term and in the opinions of the Court.

The action was tried, November 5, 1855, before the Hon. THOMAS J. OAKLEY, then Chief Justice of this Court; and on the trial—the foregoing facts being proved without contradiction—a verdict was taken for the plaintiffs, for \$15,000, subject to adjustment and to the opinion of the Court, with the right to

dismiss the complaint, and with liberty to either party to turn the case into a bill of exceptions. And it was thereupon ordered that the questions arising upon the case be heard, in the first instance, at a General Term of this Court.

F. B. Cutting and Daniel Lord, for plaintiffs.

I. The insurance being on "passage money," the policy (an ordinary printed policy on freight) must be construed with reference to the peculiarity of this novel and comparatively unusual subject; and the printed parts which are not applicable to passage money, should be rejected or construed in subordination to the nature of the insurance. In other words, the general terms of the contract must be narrowed in point of construction to the subject of passage money only. (1 Arn. on Ins., 79, 80, 210; 4 East. R., 140; Angel Car., §§ 522, 122; 2 Curtis U. S. R., 277, 291, 292.)

II. The intention of the insurance was to protect and indemnify the assured against any loss of passage money that might be occasioned by the happening of the perils usually assumed by marine insurers. An unreasonable delay in commencing or prosecuting a voyage, occasioned by damage to the vessel through stress of weather, whereby passage money is lost, comes within the policy.

III. The policy attached upon the passage money advanced or to be advanced by passengers who engaged passage by the steamer New Orleans, in New York, for San Francisco, and who were to embark at Panama, on her voyage from New York.

1. Each passenger, for the consideration mentioned in his ticket, hired a specified berth, and had entitled himself to a passage from the usual embarking point, in the course of the voyage from New York to San Francisco.

2. The plaintiffs had entered into contracts with the passengers, giving them the right to berths; had fitted and equipped the steamer for the voyage with supplies, stores, &c., and had put themselves in a position to earn the passage money.

3. The assured had thus acquired an inchoate right to the passage money, from the inception of the voyage at and from New York. The contracts with the passengers were in progress of

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being performed, and the risks of loss of the passage money by the perils of the seas, &c., had commenced.

The passage money was advanced upon an agreement that the steamer should proceed from New York to Panama, and thence to San Francisco; and the earning of the money was subject to be defeated by sea perils occurring at or after leaving New York, and before or after reaching Panama. (*Truscott v. Christie*, 2 Brod. & Bing., 324; *Devaux v. J'Anson*, 5 Bing. N. C., 519; *Flint v. Flemyng*, 1 B. & Ad., 45; *Hart v. Del. Ins. Co.*, 2 Wash. C. R., 341; 1 Arn. on Ins., 472-474; id., 205, 242, 243; *Robinson v. Manuf. Ins. Co.*, 1 Metc. R., 146; *Adams v. Manuf. Ins. Co.*, 22 Pick., 163.)

4. On a voyage at and from New York to San Francisco, the usual point of embarkation of the passengers is at Panama, and this usage constitutes part of the policy. It was intended to cover the passage money paid or to be paid in New York, for berths, &c., to be occupied when the ship had reached Panama. (*Barclay v. Shirling*, 5 M. & S., 6; *Hunter v. Leathley*, 10 B. & C., 858; 7 Bing. R., 517; 1 Arn. on Ins., 370, 373, 428-430.)

(a.) The existence of the usage is proved. There is no contradictory evidence.

(b.) The usage is of equal force, although of recent origin, and confined to the particular trade. (1 Duer on Ins., 263, § 57; 1 Arn. on Ins., 72, 73, and note.)

IV. The earning of passage money was defeated by the happening of the perils of the seas. The steamer was thereby so much damaged that she was prevented from reaching Panama within a reasonable time after leaving New York. Instead of arriving there during the month of April, as was expected, she did not arrive until the 28d of August.

1. Intelligence of the disaster to the steamer reached Panama in April, and her arrival there was not expected before July.

Neither the passengers who held tickets for passage from Panama, "in the month of April," nor those who held tickets for passage "on the first trip," were bound to wait beyond a reasonable time after the period when, in ordinary course, the steamer should have been at Panama. (*Yates v. Duff*, 5 Carr. & P., 369; *The Pacific*, Blatchf., 569, 577, 583; *Watson v. Dzykinck*, 3 Johns. R., 386; *Adderton v. Cook*, 5 Carr. & P., 869.)

In all maritime contracts, expedition is of the utmost importance. (Abb. on Ship., 249, 351, 361; 3 Kent Com., 204; *Per TINDAL*, Ch. J., in *Glaholm v. Hays*, 2 Man. & Grang., 267, 268.)

Delay by the assured discharges the underwriters. (*Hartley v. Buggin*, Park. on Ins., 652, 8th ed.; *Hamilton v. Shedden*, 3 Mee. & Wels., 49, 52; *Phillips v. Irving*, 7 Man. & Grang., 328.)

A fortiori, expedition and diligence are to be exacted from the carrier in favor of passengers.

The climate, exposure to disease, expenses, and other inconveniences at the port of detention, are to be considered. (*Phillips v. Irving*, 7 Man. & Grang. R., 328.)

V. When it was ascertained in Panama that the steamer could not arrive within a reasonable time, the passengers were entitled to a return of their passage money, or to be forwarded by other vessels, at the cost of the plaintiffs. (*Yates v. Duff*, 5 Carr. & P., 369; *Watson v. Duykinck*, 3 Johns. R., 332; *Adderton v. Cook*, 5 Carr. & P., 369; *Miston v. Lord*, Blatchf. R., 356, 358.)

Retardation of the voyage may amount to a total loss, even of goods, when they are of a perishable nature. (3 Kent, 326.)

But the doctrine of "retardation" has little or no application to passengers.

VI. As a legal consequence, from the happening of the perils insured against, the plaintiffs have expended the sum of \$1,310 in and about the support of many of the passengers while detained at Panama; (*The Zenobia*, 1 Abb. Adm. R., 94, 95;) they have refunded to others of them passage money to the amount of \$5,650; they have expended \$75,150 in forwarding the remainder of them from Panama to San Francisco. The amount received at Panama, (\$15,275,) from passengers other than those who engaged passage in New York, was more than absorbed by the expenses.

VII. The plaintiffs are entitled to recover the losses that they have thus sustained, with interest from the 2d October, 1851, to the extent of the sum insured by the defendant.

Wm. Curtis Noyes, for the defendants.

I. Common carriers, whether of goods or passengers, where there is no express agreement to transport within a specified time, are not responsible for delays occurring without their fault, as by

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a peril of the sea. (*Wibert v. N. Y. and Erie R. R. Co.*, 2 Kern., 245.)

II. The agreements contained in the tickets issued by the plaintiffs, providing (in substance) for the arrival of the New Orleans at Panama within a particular month, (April,) created obligations beyond the usual common law undertaking of a carrier, and cannot, therefore, in any way influence or control the policy made by the defendants, or impose upon them any obligations other than those which flow from the terms of the policy as interpreted and applied by the law of insurance as heretofore administered.

III. For the reasons urged on the motion to dismiss the complaint, the plaintiffs were not entitled to recover, and especially because the policy did not cover any retardation of the voyage, or any damages sustained thereby; it was simply an undertaking to indemnify the plaintiffs against any loss occasioned by breaking up the voyage and the non-earning of any passage money by the vessel.

(a.) The vessel actually earned passage money.

1. The voyage was insured as an entirety from New York to San Francisco, and the vessel actually earned passage money for carrying passengers between those ports.

2. She also earned passage money for that part of the voyage extending from Panama to San Francisco.

3. If any freight is earned, the party insured cannot recover upon a policy upon freight. (*Ogden v. Gen. Mut. Ins. Co.*, 2 Duer, 204; *Scottish Marine Ins. Co. v. Turner*, House of Lords Cases, 312.)

The rule must be the same as to passage money, as it depends upon the same principles.

(b.) The policy did not cover any claim for retardation upon well settled principles and cases.

1. A reasonable time is allowed to the shipper to repair the vessel when injured by a peril of the sea, so as to carry on the cargo and earn freight, and he may retain the cargo for that purpose. (*Clark v. Mass. Ins. Co.*, 2 Pick., 104; *Ogden v. Gen. Mut. Ins. Co.*, 2 Duer, 220.)

2. The passengers who had only general tickets for the first voyage from Panama to San Francisco were bound to await the

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arrival of the ship, and could not claim a return of the passage money they had paid, because of the delay in arriving caused by sea perils.

3. Those whose tickets were for the month of April, may not have been bound to wait, and may properly have demanded a return of their passage money; but the agreement by which this result was produced, was not binding upon, nor can it affect the defendants in any way. (*Cobb v. Howard*, 10 N. Y. Legal Obs., 355; *S. C.*, on appeal, affirmed by NELSON, J.)

4. The retardation of the voyage by a peril of the sea is not covered by the policy; and as the voyage was actually performed, and there is no pretense that any cause of abandonment existed, the plaintiffs cannot recover. (*Jones v. Ins. Co. of North America*, 4 Dal., 246; *S. C.*, reversed, 2 Binn., 567; *Mayo v. Maine Fire and Mar. Ins. Co.*, 4 Mass., 374; *Everth v. Smith*, 2 M. & S., 278; *Brookelbank v. Sugrue*, 1 Mood. & Rob., 102; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *McSwinnny v. Royal Ex. Ass. Co.*, 13 Jurist, 489; *S. C.*, reversed, 14 Jurist, 999; 2 Arn. on Ins., §§ 373-396.)

Judgment should therefore be given for the defendants, and the complaint dismissed with costs.

PIERREPONT, J. The policy in this case is an ordinary printed freight policy; the words "on passage money" are written in.

Upon well settled rules of construction, the contract must be regarded as relating to "*passage money*" only. (1 Arn. on Ins., 79, 80, 210; 2 Cur. U. S. R., 277, 291; 4 East R., 140.)

The policy was issued February 14th, 1850, and the steamship sailed on the 25th of the same month. The plaintiffs sold passage tickets for the voyage from Panama to San Francisco, both before and after the ship left New York. Each ticket contained the number of the berth to which the holder was entitled.

Some of these tickets were for "the month of April;" and some were for "her first trip" from "Panama to the anchorage of San Francisco." As appeared in evidence *this was "her first trip."*

There was evidence that on a voyage at and from New York to San Francisco, the usual point of embarkation of the passen-

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gers was at Panama; and as no contradictory evidence was offered, the usage may, perhaps, be considered as established for the purposes of this case.

If such usage is admitted, the underwriters must be considered as having contracted with reference thereto. (1 Arn. on Ins., 429, 430, 72, 73; 1 Duer on Ins., 263, § 57, and authorities there cited.)

The plaintiffs contracted with the passengers that the steamer New Orleans should proceed from New York to Panama and thence to San Francisco; and that each holder of a ticket should have passage on that steamer and be entitled to the berth named in his ticket.

If the plaintiffs did not perform their contract the holders of the tickets could recover back the passage money paid in advance; the consideration upon which the money was paid having failed. (*Brown v. Harris*, 2 Gray, 359; *Vanderbilt Cases*, 19 Barb., 222; 21 id., 26; *Lewis v. Marshall*, 7 Man. and Grang., 729; *Cope v. Dodd*, 13 Penn. R., 33.)

The policy being a contract to insure passage money, the question arises, what passage money? Was it merely the passage money of the tickets sold prior to the date of the ship's departure, or did it embrace all tickets sold for that voyage of the steamship New Orleans? Was it the passage money of those only who left New York in that ship, or did it include also the passage money of those who might afterwards embark at Panama?

In determining these questions the usage and course of trade, if such usage existed, becomes an important element. By the terms of the policy the ship was allowed "*to use port or ports on the passage.*" And as the usage was then established to receive passengers at Panama, the underwriters must be considered as having regard to that usage when they issued the policy; and hence the contract of insurance would cover also the passage money represented by the tickets which entitled the holders to embark at Panama for that voyage.

The ship was retarded but finally performed her voyage. Instead of arriving at Panama in April as was expected, she did not reach there until the 23d of August. She then took some passengers and proceeded to San Francisco. But the passengers

who had arrived at Panama with tickets for April, and for the first trip of the New Orleans, had been sent forward at the expense of the plaintiffs, or had demanded and received back their passage money.

It is here important to consider whether the plaintiffs were under any legal obligation to forward the holders of the tickets by some other conveyance, or to return them the money which they had paid for their passage.

If the plaintiffs were under no such legal obligation, then in no aspect of this case are the defendants liable.

Where there is no express agreement to transport within a specified time, a carrier is not responsible for delays occurring without his fault. (*Wibert v. N. Y. & Erie R. R. Co.*, 2 Kern., 245; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375.)

The plaintiffs' contract with the holders of the April tickets was to forward them by the steamer New Orleans during that month, and these ticket holders had a right to demand that they be so forwarded. (*Cobb v. Howard*, 10 N. Y. Leg. Obs., 355; see opinion of Judge NELSON.)

But the defendants contend that the holders of those tickets which were sold "for the first trip" of the New Orleans, could not have recovered back the passage money paid, even though the ship had been detained at St. Thomas for two years beyond her expected arrival at Panama. I entertain a different view of the law. This line had been established some two years before these tickets were sold. The steamer New Orleans, named in the tickets, had left, or was about to leave New York for Panama; she was expected to arrive there in April; the tickets were "for her first trip," and this voyage was the commencement of "her first trip." The passengers were on their way to California; time was to them a consideration of the utmost importance, and this was a matter of general notoriety and well known to the shippers. Under these circumstances the contract of the plaintiffs with the passengers must be regarded as a contract to forward the holders of those tickets in a reasonable time after their arrival at Panama. After waiting at Panama a reasonable time for the arrival of the steamer, these passengers had a right to demand a return of their passage money, or to be forwarded by some other vessel. (*Yates v. Duff*, 5 Carr. & P., 369; 3 Kent

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Com., 204; Abbott on Ship., 249, 351, 361; *Phillips v. Irving*, 7 Man. & Grang., 328; *Glaholm v. Hayes*, 2 id., 267.

But though the passengers might have recovered back their passage money, yet it does not follow that the defendants would therefore be liable to the plaintiffs.

The defendants can be held liable only on the ground of their own contract. That contract is a policy of insurance and imposes upon the underwriters no other obligations than those which flow from the terms of the policy as interpreted by the law of insurance as it stood when the policy was issued.

It has long been settled law that retardation of the voyage by a peril of the sea is not covered by a policy like this where freight is insured.

The underwriters take upon themselves no risk as to the length of the voyage. But they only undertake that the ship shall not be prevented from performing her voyage by any of the perils insured against, so as to be unable to earn the freight insured; they do not undertake any risk as to the cost or time of the voyage. (*Jordan v. Warren Ins. Co.*, 1 Story C. C. R., 351; *Mayo v. Maine Fire Ins. Co.*, 4 Mass., 374; *Everth v. Smith*, 2 Maul. & Sel., 278; 2 Arn. on Ins., §§ 373, 396; *McSwinnny v. Royal Ex. Ass. Co.*, 13 Jurist, 489; *Ogden v. The General Mutual*, 2 Duer, 220.)

When this policy was issued, the law was well settled as to the construction of its terms as applied to freight; and if the insurance had been upon freight to be shipped at Panama, the plaintiffs could not have recovered in this action. Is a different construction to be given where passage money instead of freight is the subject of insurance? Does that change the undertaking on the part of the underwriters where all the other terms of the policy are the same?

No time is expressed in the policy within which the steamer was to arrive at Panama; but the plaintiffs contend that the undertaking was that the ship should not be prevented by the perils of the seas from arriving at Panama in time to take the passengers in accordance with the shippers' contract. It does not appear from the case that the underwriters had any knowledge of the contract between the shippers and their passengers, and

the policy must be construed according to the legal meaning of its express terms.

The steamer reached Panama, took passengers there, and completed her voyage. Suppose she had found more passengers there when she arrived in August than were waiting in April, and had taken them on; would it then be contended that the underwriters were liable? If they were liable because of retardation beyond the month of April, then the liability was complete on the first day of May, and an action would lie against them.

If the plaintiffs had commenced suit on the first of May, and had recovered judgment on the first of August, which the defendants had then paid, and after that the steamer had arrived at Panama, and there taken more passengers than were waiting in April, and had proceeded with them to San Francisco, it would then be evident that damages had been recovered against the defendants for breach of contract, which, according to all former construction of such contract, had not at all occurred.

It so happens that the steamer did not earn as much passage money on this voyage as though she had reached Panama in April; but it might have been the other way; and I am of opinion that the same rules of construction, as to length and retardation of the voyage, are to be applied in this case as have been heretofore applied to freight policies; and that the vessel having finally performed her voyage, and having taken passengers and earned passage money on that voyage, there has been no breach of contract on the part of the underwriters, and that the plaintiffs are not entitled to judgment in this action.

It is by no means clear that the steamer was prevented, by perils of the seas, from reaching Panama in time for the April passengers. The proof is, that the ordinary time for such a ship to go from New York to Panama, was from sixty to seventy-five days; whereas, there were only sixty-three days between the time she left New York and the last of April; and it appears from the case that the vessel was retarded by other causes besides "*perils of the seas.*"

I think the plaintiffs have not made out a case which entitles them to recover, and that judgment should be entered for the defendants, dismissing the complaint.

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SLOSSON, J. There appear to have been three classes of passengers. One class embarked in the vessel at New York, and made the entire voyage; another engaged for the passage from Panama to San Francisco, in the month of April, and the third engaged for the passage from Panama to San Francisco in the first trip of the steamer—all paying for their passage in advance.

In respect to the first class, no question whatever arises. The receipt or ticket given by the plaintiffs to the second of these classes for the passage money, is expressed to be "for the passage of —, in the steamship New Orleans, from Panama, in the month of April, to the anchorage of San Francisco."

That given to the third class is the same in all respects, except that the words "on her first trip," are used instead of the words "in the month of April."

These receipts or tickets constituted valid contracts on the part of the owners of the vessel with their passengers, to transport them from Panama to San Francisco. (*Cope v. Dodd*, 18 Penn. R., 33.)

The vessel not having arrived at Panama in the month of April, the plaintiffs, acting doubtless upon the supposition that they were legally bound to provide other means for the transportation of their passengers or to refund the money which they had received in advance, did so refund to a considerable amount to those who preferred not to go on, and expended a very large sum in forwarding the remainder of the passengers from Panama to San Francisco, and incurred heavy expenses for the support of the passengers while detained at Panama, and they now claim to recover these moneys of the defendants, to the extent of the sum insured, as a loss within the policy.

On the argument, this assumed legal obligation on the part of the plaintiffs was strongly pressed as lying at the foundation of the claim upon the insurers, and the argument necessarily assumed that the policy, notwithstanding the generality of the expression by which the subject of the insurance was defined, covered the special contracts in question; in other words, that taking into view the usage of the trade, the contract of insurance in this instance, was in legal effect an undertaking to indemnify against any loss of passage money which the plaintiffs might suffer under these special contracts in which time is made

an essential element, whether the contracts were made known to the insurer or not, if such loss was the consequence of result of a peril of the sea.

In such a view of the case the legal obligation of the plaintiffs to refund the passage money on their failure to fulfill their contract in time, or to provide other means for the transportation of their passengers, might perhaps become an important question, but the construction which we have given to the policy, as will be seen, rejects the idea of its being an undertaking to indemnify against these special agreements in any such sense as contended for, and for this reason as well as for the more important one, that the defendants' liability is to be determined by the nature and character of the proximate cause of the loss, it is unnecessary to discuss the question whether under the circumstances the plaintiffs were under a legal obligation to refund these moneys or provide other means of transportation for their passengers; whether they were or not does not affect the question of the defendants liability under this policy.

I should however feel but little difficulty, were it necessary to do so, in expressing an opinion on the subject of this liability of the plaintiffs to their passengers, and for all the purposes of this decision am willing that it be assumed that such liability did exist in respect to both the "April" and "first trip" passengers, and that the plaintiffs in refunding their passage money which they had received and providing other means for the transportation of the parties who held their tickets and insisted on going on, did only what they were under a legal obligation to do.

Having done so can they recover the moneys so expended or refunded of these defendants as a loss under this policy?

The insurance is upon "passage money, at and from New York to San Francisco, with liberty (to the insured) to use port or ports on the passage."

The contract is to be construed in reference to the usage in the particular trade in which the steamer was to be engaged, and which is clearly established, though like the trade itself, of recent date, and this was to engage passengers through from New York to San Francisco, taking them by steamers to Chagres, thence by land across the Isthmus to Panama, where they embarked in

other steamers of the line to San Francisco, and when steamers left New York for San Francisco by way of Cape Horn it was the practice to advertise and engage passengers in New York to embark by such steamers at Panama.

In view of this usage, and even without it, under the liberty to "use port or ports on the passage" the policy in this case covers passage money to be earned for the portion of the voyage between Panama and San Francisco, as well as that for the entire voyage around the Cape; but it by no means follows that it covers the particular passage money stipulated for in these contracts in such sense as that it is to be considered as the specific subject of the insurance. The same rules of construction apply to an insurance on "passage money" as to an insurance on "freight," and it was expressly held in *Everth v. Smith* (2 Maule & Sel. R., 278) that an insurance on "freight" simply was not an insurance on the particular freight stipulated for in the charter party, but that if the vessel earned any freight, though not that particular freight, the underwriters would not be liable.

After all it is not perhaps material whether the policy covers the particular contracts or not, since the question in either aspect must ultimately come to this, whether the loss is one by a peril insured against; if it is not, it is of little moment whether the policy attached upon the passage money secured by the contracts, or not, since in neither case would the insurers be liable.

I address myself therefore to this question.

Was the loss of the passage money under these contracts (assuming them to have been covered by the policy) attributable to a peril against which the insured were protected by their policy?

The loss was owing to the delay of the vessel in reaching Panama, by reason of which disappointment the plaintiffs (whether legally bound to do so or not is immaterial) refunded the moneys which they had received of the parties whom they had contracted to carry from that port to San Francisco and who did not wish to go on, and procured passage in another vessel at great expense for those who insisted on being carried to their journey's end.

It is said that this retardation being a consequence of the injuries sustained by the vessel from perils of the sea, obliging her

to put into St. Thomas for repairs constitutes a loss within the policy. To this the answer is obvious; the insurer is only answerable for losses that are the direct or necessary consequence of a peril covered by the policy; the damage to the ship was the immediate consequence of a peril of the sea; her delay at St. Thomas was the cause of the loss of the passage money in question; the loss therefore is attributable not to the peril, which forced the vessel into St. Thomas, as its proximate cause, but to the retardation of the voyage which was a consequence of that disaster.

It is true that the insurer is liable for the necessary natural and inevitable, as well as for the immediate, consequences of the peril, but he is not liable for all the indirect or remote results of it. See *Tilton v. Hamilton Insurance Company*, (1 Bosw. R., 367,) where this doctrine is discussed.

It cannot be said that the loss of passage money generally, nor the loss of the particular passage money stipulated for in these contracts, was in any sense a necessary or inevitable, or perhaps even a probable, consequence of the peril which obliged the ship to stop at St. Thomas. Her detention there, as to time, was a matter wholly uncertain, depending on the facility of procuring repairs. The ability of the ship to resume and prosecute her voyage and earn her freight depended on the extent of her disaster and the means at hand for repairing her, and was not affected by the time occupied in making her repairs. Even if it be admitted that the Company have undertaken to insure these specific passage moneys, they have done so only against the perils enumerated in the policy. They have not undertaken that these moneys shall be earned at all hazards, and within the period specified in the contracts, but that they shall not be lost through any disability or the ship, from a peril insured against, to earn them. No such disability is pretended. The vessel accomplished her whole voyage, and earned, or might have earned, all her stipulated passage money. She actually did earn that of the passengers who went with her around the Cape; and she was in a condition to earn that of those who might be ready to embark in her on her arrival at Panama.

It will not be pretended that there was any loss on the passage money of those who embarked in the ship at New York, and

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made the voyage around the Cape, nor that these passengers could successfully claim, by way of reclamation for the delay at St. Thomas, a return of the whole or any portion of the price of transportation which they had paid in advance. In respect to them there has been no loss by a peril insured against, because the vessel, though delayed, actually accomplished the voyage, and completed their transportation. She was equally competent, and was ready and willing, to do the same thing, with no greater delay, in respect to those who preferred to join her at Panama; and had those passengers been at that port on her arrival, they could have claimed their berths as against all the world, and have gone in her to her port of destination.

It is difficult to perceive how a different construction is to be given to the policy as respects one set of passengers from that which applies to the others, or how, under the same contract, which makes no discrimination, the Company should be held liable, under the same state of facts, in respect to the loss of the passage money due from one class of passengers, when it would not be in respect to that due from another.

If it be conceded that the parties who held these tickets were not bound to wait the arrival of the vessel at Panama beyond the month of April, or beyond a reasonable time, that was a matter between them and the owners of the vessel only; and even if they had the right to throw up their contracts after the period indicated, their doing so could not, in the absence of any stipulation to that effect in the policy, impose on the insurer an obligation of indemnity.

A policy might be unquestionably framed to cover such a case; but, certainly, this one is not so framed.

The general rule, that the insurer is not liable for the consequences of a mere retardation of the voyage, though resulting from a peril of the sea, is too well settled to be disputed, and is equally applicable to the case of freight as of cargo.

The case of *Anderson v. Wallis*, (2 Maule & Sel. R., 240,) was that of an insurance on cargo from London to Quebec. After accomplishing a greater portion of the voyage, the ship was, by stress of weather, obliged to put back into the port of Kinsale, in Ireland, where she was detained so long for repairs that the season was lost, and no other vessel could be procured to carry on the

cargo, and even if one could have been procured, it was too late to have prosecuted the voyage that season. The voyage was accordingly abandoned, and the captain sailed on another voyage. The cargo, which was partially damaged, was sold as damaged, and the plaintiffs abandoned and claimed for a total loss. For the plaintiffs it was contended that, as there was a known course and period for performing such a voyage, it was implied in the contract that the voyage should be performed in such a period, or at least within a reasonable time; but the Court held, that "interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure and throwing this burden on the underwriters. Disappointment of arrival," said Lord ELLENBOROUGH, "is a new head of abandonment in insurance law." If the cargo be perishable, the case may be different; but that is the only exception. (3 Kent, 7th ed., 401.)

The case of *Everth v. Smith*, (2 Maul. & Sel.,) already cited, was that of an insurance on vessel, freight and cabin cargo, at and from Riga and any other port in the Baltic to the United Kingdom, detention by princes being one of the perils insured against. The vessel sailed from London on the 12th day of July, 1812, under a charter party, by the provisions of which the ship was to report herself at Riga to the agent of the charterers, who was to supply her with a cargo for the port of London. She delivered her outward cargo at another port in the Baltic, and then proceeded to Riga under a Rostock flag, arriving there on the 23d day of September, and reported herself to the charterers' agent. But the Russian government prohibited the loading of any goods on board her, because of her having sailed under that particular flag, and she was thus detained until the 20th day of October, when the frost set in, in consequence of which she was obliged to remain the whole winter at Riga, and did not get any cargo from the charterers' agent, but in the spring the master procured a cargo from other persons, with which he returned to England, but the expenses attending the detention amounted to more than the freight. The plaintiffs claimed that this was a loss of the specific freight which would have accrued under the charter party by means of one of the perils insured against, and therefore covered by the policy; while the defendants contended that it was not a loss within the policy, because the insurance was not

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on any particular designated freight, but only on freight for a designated voyage, and that freight had been earned by the performance of the voyage; that to hold the insurer liable in such a case would be to make the underwriter not an insurer on freight for the voyage, but an insurer for the performance of the particular contract, and (which is the point to which the case is now cited) that even if this could be done, it did not appear that the contract could not have been performed, or that anything more than a delay in the performance was occasioned by the detention, which is not a loss if freight be ultimately earned. The Court adopted this view. "The underwriter," said Lord ELLENBOROUGH, "did not insure that any particular freight should be brought home, but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured;" that the only inconvenience that has arisen, was to be attributed to the protraction of the adventure; and he referred to *Anderson v. Wallis* and another case, as showing that that did not constitute a loss. "The not obtaining the freight looked for," said he, "is a new head of abandonment, and so it is of loss."

Retardation of the voyage by a peril insured against, does not constitute a technical total loss of the ship, unless she be rendered thereby totally incapable of performing her voyage, and this, even though by such retardation the voyage be not worth pursuing, or the cargo be thereby so injured as to be not worth transporting; for such an insurance is not an insurance of the ship and the voyage, but of the ship for the voyage, which means that the ship shall not, by means of a peril insured against, be rendered incapable of performing her voyage. (*Bradlie v. Maryland Ins. Co.*, 12 Pet. R., 378; *Alexander v. Baltimore Ins. Co.*, 4 Cranch R., 370.) These cases are cited and approved in *Ruckman v. The Merchants' Insurance Company*. (5 Duer, 342.)

There is no difference in principle, whether the claim be for a total or a partial loss.

In *Mayo v. The Maine Fire and Marine Insurance Company*, (4 Mass. R., 374,) the claim was for a partial loss of freight arising from the detention occasioned by an embargo. The vessel was subsequently released and received her stipulated freight. The plaintiff claimed that if the vessel had not been detained she would have earned her freight in less time, and that therefore

there was a partial loss of freight; but the Court held there was no partial loss, and say: "The underwriters did not insure any particular time in which the voyage should be performed, but only that the freight should be earned. They are not, therefore, answerable for a partial loss arising from the increased length of the voyage by the detention, any more than they would have been if the arrival of the vessel had been delayed by violent storms which had driven her out of her course."

Without a further citation of authorities, I think it clear that an insurance on "passage money," generally, like an insurance on "freight," which does not specify any particular freight, does not bind the insurers to indemnify the insured against the loss of particular passage money, secured by special contracts with the passengers, and which are not shown to have been communicated to the insurer, or to have entered into his contemplation at the time of effecting the policy, except in those cases only in which he would be bound to indemnify were there no special contracts in existence, and that is where, by a peril insured against, the ship is disabled from earning such passage money by completing her voyage; and that a mere retardation of the voyage, though a consequence of a disaster to the ship occasioned by a peril of the sea, if the ship actually prosecutes and completes her voyage eventually, is not a loss covered by a policy in such a form, and in which retardation or delay is not named as a peril, notwithstanding the insured may, through such delay of the voyage, have lost passage money secured by special contracts with parties whom he had engaged to transport within a certain time.

If the trade in the present case was novel and peculiar, so much the more necessity was there for parties resorting to special stipulations in their policies. The Court can only deal with contracts as they find them, and whether the result be disastrous to parties or not, can only interpret them on the settled rules of construction applicable to such instruments.

Judgment should be entered that the complaint be dismissed.

WOODRUFF, J. Without expressing any opinion upon the question whether upon the facts appearing in this case the persons who had engaged passage in the steamship *New Orleans* and paid their passage money or any of them could, by law, have

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recovered back such passage money, and without discussing some of the other questions which have been considered by my brethren, I fully concur in the conclusion at which they have arrived, viz., that the defendants are not liable to the plaintiffs under the policy declared upon for the loss of the passage money of those persons who, having engaged passage from Panama to San Francisco, neither embarked on board the vessel at Panama nor were there on her arrival at Panama in readiness to embark.

I do not deem an opinion upon the questions above alluded to at all necessary to the decision of this case. I prefer therefore to rest my conclusion upon a few of the grounds which may be abstracted from the opinions of my brethren and which, without necessarily adopting all the reasons assigned therefor, are briefly these:

By a policy of insurance upon passage money generally, for the voyage, there is covered the passage money of all persons who embark on the vessel.

Where the voyage described in the policy contemplates the use of ports intermediate its termini, the policy covers the passage money of such persons as have engaged passage at such intermediate ports to embark in her on her arrival at such intermediate ports and are there in readiness to embark in her on her departure. These two classes form the subject of the insurance.

The insurer may therefore be said to guarantee to the ship owner that the vessel shall not be prevented, by a peril insured against, from earning the passage money of those who embark; and that she shall not be prevented, by a peril insured against, from using those intermediate ports and arriving there in a condition capable of receiving and transporting any persons who have engaged to take passage in her when she arrives and who are there in readiness to embark for the residue of the voyage.

The policy does not necessarily cover all moneys paid for passage under special terms or conditions which the owner and any particular passenger or class of passengers may think proper to assent to as between themselves so as in any sense to guarantee that those special terms or conditions shall be complied with.

The undertaking in the policy is not that the vessel shall complete her voyage or arrive at any particular port within any

period of time greater or less, or by any particular day. Nor that she shall so arrive as to enable the owner to perform any particular contract or contracts with persons engaging passage. But only that she shall arrive; that she shall be in a condition in which she can receive on board such persons as are in readiness to embark in her, and that the passage money of those passengers shall be earned: or, more strictly, that such arrival, condition and earning of the passage money shall not be prevented by a peril insured against.

Mere delay or retardation in the completion of the voyage or in accomplishing any part of it, though it be caused by a peril insured against, constitutes no ground of claim against the insurers under such a policy. The contract by them is satisfied if the voyage is actually made and the vessel is at all times in a condition, at any of the ports she is permitted to use, to receive and carry all persons who, having engaged passage, are ready to embark for or on the voyage which she actually makes.

The question whether, notwithstanding the voyage was made and all passengers were carried who embarked and all who, on her arrival at the intermediate port, were found to have engaged passage and who then embarked, other persons with whom the owners had made special contracts to carry, but who would not or did not await the arrival of the ship *New Orleans* at Panama, could, by law, recover back the passage money they had paid, is wholly immaterial. If the owners deemed it wise to make contracts with such passengers and receive their money upon terms amounting to a guaranty that the vessel should arrive at Panama, or be in readiness to leave Panama in the month of April or within any other period, the owners and not the insurance company took the hazard of such arrival. No such guarantee was made by the defendants. And on the other hand, if the passengers in the present case could not, under the terms on which they paid their passage money, have recovered it back, then, of course, the repayment was voluntary and the defendants are not affected by it.

Had passage money been paid to the owner by a person with whom, besides assuring him passage, the owner stipulated that she should sail from Panama by a particular day, the Company would be in no wise parties to such a contract. They have not

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guaranteed in any sense the ability of the ship to perform such a contract; nor that perils of the sea shall not detain the vessel beyond such day.

The ship New Orleans performed the voyage described in the policy. She carried safely and delivered all persons who embarked in her as passengers for that voyage or for any part of it, and all persons whom the owners could procure, at any port at which she touched, to take passage in her on her arrival and departure from such port. Though perils insured against retarded the voyage, they did not prevent her doing all this.

No loss has occurred within the policy sued upon.

These views are, I think, fully sustained by the principles of the adjudged cases, and the treatises on the subject. Those collected and stated in the opinions of my brethren are sufficient, and I should but repeat them if I were to extend the discussion to any greater limits. The defendants should have judgment.

Judgment for defendants.

BENJAMIN I. H. TRASK, Jr., Plaintiff, v. CHARLES H. JONES, Executor, and SARAH JONES and PHEBE J. HEWLETT, Executrices of Walter R. Jones, deceased, Defendants.

1. Where, in an action to recover freight for carrying property in a certain vessel and on a voyage named, from New York to San Francisco, the defense is, in part, that it was not carried under such a contract as the bill of lading signed by the master expressed; but was carried under a special contract made between the shipper and one R. R. Hunter; and that Hunter was duly authorized by the owners to make such contract; an admission at the trial that an advertisement (which was produced) was published prior to making such contract, daily in two newspapers (named) at the port where such merchandise was shipped, for a period of six weeks; stating (*inter alia*) that persons desiring freight should "apply to R. R. Hunter, 80 Broadway; J. Belknap Smith, 88 Wall street; or to the captain or agent on board at Pier 4 North river," imports that such advertisement was published by authority of the owners of the vessel; and that each of the persons named in it was authorized to make contracts for the carrying of goods in the vessel on that voyage.

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2. After such evidence of Hunter's authority to contract had been given, evidence of a contract between him and a shipper of goods in such vessel for the particular voyage, fixing the rate of freight to be paid, was admissible.
3. An order drawn by one who has furnished supplies to a vessel indorsed upon one of her bills of lading and drawn upon the master requesting him to pay a sum named, describing it as the freight on the bill of lading, of which the within is a copy, and accepted by the master with the knowledge and assent of the owners of the vessel, is a sufficient equitable assignment of the freight of the goods in such bill of lading mentioned, and entitles the assignees to recover that freight from the shippers of the goods.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, April 14th; decided, June 25th, 1859.

THIS action was tried before Chief Justice DUER and a jury, on the 1st of June, 1857, and now comes before the Court on questions of law arising at the trial, and there ordered to be heard in the first instance at the General Term. It was originally commenced against Walter R. Jones, who shipped goods from New York to California, to recover for carrying the same, and he having died pending the suit, it was, by order made May 7, 1855, continued against Charles H. Jones, Executor, and Sarah Jones and Phebe J. Hewlett, Executrices, of his last will and testament.

The plaintiff brings the action to recover the amount alleged to be due for carrying materials for a storehouse from New York to San Francisco in 1850, in the ship *Clarendon*. The complaint alleges that the contract for the carrying of the storehouse is contained in a bill of lading signed by the master, Henry S. Brown, and that a copy thereof is annexed to the complaint, and marked exhibit A. The sum claimed is \$1,611.75, "or so much as the carriage of said merchandise as herein set forth is worth." The complaint also states that the owners of the ship being indebted to Merritt & Trask in the sum of \$7,044.77 for stores and ship-chandlery furnished to the ship in the port of New York, Brown, the master, as master and by virtue of his lawful authority and as collateral security for the payment of this debt, and before the sailing of the ship, by his written acceptance of an order drawn upon him by Merritt & Trask, "assigned the entire freight on said merchandise, as per bill of lading, to said" Merritt & Trask.

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This order of Merritt & Trask was drawn on one of the bills of lading for the merchandise which the master had signed, and is in these words:

"NEW YORK, September 17, 1850.

"For value received, please pay sixteen hundred and eleven $\frac{17}{100}$ dollars freight on bill lading, of which the within is a copy to the order of Merritt & Trask.

(Signed)

"MERRITT & TRASK.

"To Capt. HENRY S. BROWN,

"Ship Clarendon,

"San Francisco.

"Accepted September 17, 1850.

(Signed)

"HENRY S. BROWN."

Before this bill for stores and ship-chandlery furnished by Merritt & Trask was contracted, Raphael Schoyer had agreed with the owners of the vessel to purchase her at \$25,000, and pay \$8,000 cash in hand and \$17,000 on the arrival of the ship at San Francisco. That being paid the voyage was to be his. He paid the \$8,000 down, and ordered the stores and ship-chandlery furnished by Merritt & Trask. Brown, the master, was a part owner, and a Mr. Codman was the other part owner. It was proved that Brown accepted the foregoing order in the presence of Codman and Schoyer.

These are the acts which are relied on as amounting to an assignment of the claim for freight to Merritt & Trask. They made an assignment of the claim to the present plaintiff.

By the bill of lading signed by the master, the merchandise was to be carried for 50 cents per cubic foot, with 5 per cent primage and average accustomed.

The defense is, in part, that the goods were not shipped under such a contract as the alleged bill of lading specifies, and that no such bill of lading was ever delivered to or accepted by the shipper of the goods. But on the contrary, that they were put on board upon an agreement between the shipper and R. R. Hunter, the authorized agent of the ship, by which they were to be carried for "one-third of the net proceeds of said articles or merchandise after their arrival at San Francisco and their sale there by" John C. and Henry Hewlitt, the consignees of the cargo.

The Judge, at the trial, held that there was no such contract as the bill of lading signed by the master expressed; and instructed the jury that there was no express contract for the carriage of the goods proved; and that the plaintiff was entitled to recover the customary rates, less the proceeds which had been realized from a sale of the lumber, it having been sold in San Francisco because the consignees refused to receive it and pay freight at the rate of 50 cents per cubic foot. The defendants excepted to each part of this charge. The jury found a verdict for the plaintiff for \$1,851.17, subject to the opinion of the Court at General Term on the questions of law arising at the trial.

The evidence of Hunter's authority, as agent, was as follows:

The plaintiff's counsel admitted that an advertisement marked schedule "G" was published daily in the New York Journal of Commerce, commencing June 29, 1850, and continuing until September 19, 1850; and in the New York Courier and Enquirer from July 17, 1850, till about the same time, and it was read in evidence. It reads thus, viz.:

"G"

"First vessel for San Francisco, the superior, fast-sailing Canton packet ship

"CLARENDON,

"HENRY S. BROWN, Commander,

"will soon be ready for sea. Shippers who have engaged freight will please send it on board without delay, together with their bills of lading. For balance of freight apply to

"R. R. HUNTER, 80 Broadway,

"J. BELKNAP SMITH, 88 Wall street,

"or to the captain or agent on board at Pier 4, North river."

The defendants also produced a written memorandum proved to be in the handwriting of Hunter, which was read in evidence and marked exhibit "J," and is as follows:

"House is about 1,600 cubic feet, at fifty cents per cubic	
foot,	\$800
Five per cent primage,	40
	\$840

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"Cost of house about \$500.

"We will take one-half of the gross proceeds of the house. This leaves the arrangement greatly in favor of the shipper; suppose the house sells for \$1,000, in that case the shipper will get the full amount of his cost, and the ship will get but thirty cents per cubic foot.

(Above is a copy of Hunter's estimate.)

"Say $\frac{1}{2}$ the net proceeds.

"13th July, 1850. Agreed to $\frac{1}{2}$ of net proceeds to be allowed for freight.

(Signed)

"W. R. J."

The defendants proved that bills of lading to be signed by the master, for the carriage of the goods, and stating that they were to be carried on the terms alleged in the defendants' answer, were prepared by Walter R. Jones and sent by him long before the ship sailed, to the office of Schoyer & Hunter, to be signed by the master.

The declarations of both Schoyer & Hunter, in their conversations with the agent of Jones as to these bills of lading being signed by the master, were excluded and the defendants excepted.

The defendants offered to prove that Hunter, from time to time, assured Jones and promised him that these bills of lading should be signed by the captain, and that when Jones' agent called, from time to time, to get the bill with the master's signature thereto, Hunter sometimes gave the excuse, for the delay in signing them, that the master was out of town, or some like reason, but promised that they should be executed by the captain, and that "these calls and promises were repeated till after the ship sailed." This evidence was excluded and the defendants excepted.

Various other exceptions were taken which it is unnecessary to state, as they were not passed upon by the Court in disposing of the case.

John E. Burrill, for the plaintiff.

I. There was no evidence to show that Hunter was authorized to make contracts for the ship as owner, or in any way to act for them, but the contrary clearly appears.

II. The property having been shipped by Jones on board the *Clarendon*, and conveyed to San Francisco, the owners were entitled to recover freight.

If, as the defendants insisted, Jones had not contracted to pay the rate specified in plaintiff's bill of lading, and if, as was clear, the ship owners were not bound by the acts of Hunter, it follows that there was no contract as to the rate of freight, and the ship-owners became entitled to recover such sum for the carriage of the goods, as it was reasonably and fairly worth, according to the usual and customary rates of freight, at that time.

III. The pleadings were sufficient to warrant a recovery on a *quantum meruit*.

IV. The delivery of the bill of lading, and the instrument thereon indorsed to Merritt & Trask, under the agreement proved by Brown, was sufficient to transfer and convey to them the right to demand and recover the freight for the carriage of the merchandise.

1. Brown was the half-owner and the ships-husband, and authorized to finish and procure the necessary supplies for the voyage, and for that purpose to create a lien either upon the vessel or her freight.

2. Merritt & Trask had furnished ship-chandlery and stores to the vessel for the voyage, and had a lien upon the vessel therefor, and the transfer in question was made to them for the purpose of paying the same.

3. The consideration for the transfer was not only good and valuable, but was peculiarly beneficial alike to the owner of vessel and cargo; and Merritt & Trask, having abandoned their lien on the faith of the transfer of the freight, upon every consideration of honesty and justice, are entitled to be protected.

4. It is evident that the intention of Brown & Codman was to assign the freight for the carriage of these goods to Merritt & Trask; and if the instrument does not amount to a formal and technical assignment, the intention of the parties should be carried out, and the instrument sustained as an equitable assignment of such freight.

5. The freight was payable on the delivery of the goods at San Francisco; and the captain, in that character, was the proper person to collect the freight as the agent of the owners.

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6. The captain, as such, from the peculiar character of his agency and duties, has the right in his own name to collect the freight and to take all proper and necessary steps for that purpose.

6. Brown being thus entitled to collect and receive the freight, both as captain and owner, by the instrument on the bill of lading, agrees to collect the freight for the carriage of the goods for Merritt & Trask, and to pay the same over to them or their order, and thus became their agent.

8. If A, being creditor of B, agrees with C to collect the amount due and pay over the same to C, the latter is the assignee of the debt.

9. At common law, and prior to the Code, in the case last named, C could not maintain an action in his own name without a promise on the part of the debtor to pay C, the assignee; but, under the Code, the rule is changed, and the action must be brought in the name of the real party in interest.

10. The assignment to Merritt & Trask of the freight in question was made by Brown, by and with the knowledge and consent of Codman, the other half-owner.

The plaintiff is entitled to judgment on the verdict.

Luther R. Marsh, for defendants.

I. The plaintiff shows no title to the freight, if a claim of freight was established, and has no right to maintain the action.

1. There being another legal owner, Codman, and also an equitable owner, Schoyer, the master had no legal right to assign. (3 Kent's Com., 8th ed., 221, *et seq.*, 171; 12 Conn. R., 489.)

2. The alleged assignment consists in a mere acceptance, by the master, of an order indorsed upon a copy of the bill of lading, drawn to the order of Merritt & Trask, requesting him to pay a specific amount, described as "freight on bill of lading, of which the within is a copy," and on its face addressed to the master at San Francisco. It does not purport to be an order upon Mr. Jones, nor any person owing or having funds, and it is a mere bill of exchange and personal promise of Brown, and it lacks every requisite, either of an assignment or an appropriation of funds not collected. (*Rogers v. Hosack's Ex'r*, 18 Wend., 319, 334; *Hoyt v. Story*, 3 Barb., 263; *Dickenson v. Phillips*, 1

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Barb., 454, 458; *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *Hawley v. Ross*, 7 Paige, 103; *Malcolm v. Scott*, 3 Hare 39.)

3. No action could be maintained against the owners upon this as their acceptance. The prefix "Capt." in the address is merely descriptive, (2 Seld., 168; 10 Wend., 87; 11 How. Pr. R., 11; id., 36,) and it is not added to his signature.

4. No right to collect freight was relinquished on the part of the owners. Nowhere is there a pretense of direction or authorization by anybody to Mr. Jones to pay to any one but the owners. There is no privity with Mr. Jones. An agreement by the owners to pay over the amount received for freight, of itself, would imply that it was still to be collected through them, and could constitute no appropriation. (*Dickenson v. Phillips*, and other cases, *supra*; *Marine and Fire Ins. Bank v. Jauncey*, 3 Sand., 264; *Winter v. Drury*, 1 Seld., 525; 3 Sand., 263; *Cowperthwaite v. Sheffield*, 1 Sand., 416, 449; 3 Comst., 243, 248, *et vide* 4 Hill, 263; 3 Comst., 251.)

5. If the indorsement were even an equitable assignment, which it is not, the action should be brought for equitable relief, and the owners of the vessel made parties, so as to protect the defendants against the legal title, especially when there is a dispute as to the extent and validity of the assignment. (Story Eq. Pl., §153; Cases *supra*, and 8 Price, 269; 1 Jac. & W., 506; 5 Maule & Sel., 549.)

6. No freight has been earned, and the right to freight was inchoate and incapable of assignment. (*Otis v. Sill*, 8 Barb., 102; *Bank Lansingburgh v. Orary*, 1 Barb., 551; *Field v. The Mayor*, 2 Seld., 179; *Robinson v. Macdonnell*, 5 Maule & Sel., 228.)

7. It is not now sought to recover upon the bill of lading upon which the indorsement was made, and the indorsement could transfer no right of action independent of the bill. (*Battle v. Coit*.)

8. Brown's coöwnership is not good foundation for an authority to assign. He could not divide the cause of action by assigning his interest, nor could he assign his coöwner's interest. (2 Seld., 179; 5 Wheat., 277; *Hyde v. Stone*, 9 Cow., 230.)

II. The complaint was upon a written express contract, and it is evident there was an express contract. A recovery upon an implied contract was inadmissible. (*Ladue v. Seymour*, 24 Wend., 62; *Smith v. Smith*, 1 Sand., 208.) The defendants came pre-

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pared to disprove this express contract, and was unprepared with proof as to a *quantum meruit*. The objection was repeatedly made on the trial.

III. No ground for recovery upon a *quantum meruit* is established. It was never pretended that Mr. Jones engaged freight upon a general agreement.

IV. A fraud was practised upon Mr. Jones in this matter; the lumber would not have been sent at ordinary rates for other cargo; he made a contract with the advertised agent, without which it could not have been taken; through no other channel or means was any authority obtained for carrying the lumber; bills of lading were left at the advertised office, with this advertised agent, according to the custom of shippers, and this agent took no exception, nor did any one, to the bills agreed upon, but frequently promised that they should be formally signed, and the shipper, Mr. Jones, was not liable upon any other agreement than that made with such agent.

A new trial should be ordered.

BY THE COURT—BOSWORTH, Ch. J. Henry S. Brown, the master, and a part owner of the Clarendon, testified that Raphael Schoyer had agreed, before the departure of the ship, to purchase her for \$25,000, and had paid down, in cash, \$8,000, and was to pay the other \$17,000 on her arrival at San Francisco. That being paid, the voyage was to have been his own.

The ship-chandlery and stores furnished by Merritt & Trask, to secure the payment of which the claim in question was, or is claimed to have been, assigned, "were ordered by Raphael Schoyer." They were, of course, so ordered with the knowledge of Brown & Codman, the owners who had made this contract to sell her.

Codman, Brown and Schoyer were present when the transfer (so called) of the freight in question to Merritt & Trask was made.

It was admitted by the plaintiff that an advertisement was published from the 29th of June to the 19th of September, 1850, in the Journal of Commerce, and from the 17th of July, 1850, till the 19th of September following, in the Courier and Enquirer, to the effect that "shippers who have engaged freight" (in the

Clarendon) "will please send it on board without delay, together with their bills of lading. For balance of freight apply to R. R. Hunter, 80 Broadway, J. Belknap Smith, 88 Wall street, or to the captain or agent on board, at Pier 4, North River."

This constitutes sufficient evidence, *prima facie*, that Hunter was authorized to make contracts for the carrying of cargo, and the freight to be paid therefor.

Exhibit "J" is proved to have been written by Hunter. That furnishes some evidence that he agreed the house should be carried for one-third of the net proceeds of a sale of it.

If Schoyer had paid the \$17,000 on the arrival of the Clarendon at San Francisco, so that the vessel and the voyage would have become his, I think it cannot be doubted that the evidence given and excluded would have established, as between him and Jones, such a contract as exhibit "J" imports.

Brown & Codman, having received \$8,000 of the contract price, which was to be forfeited on a failure to pay the \$17,000, according to the contract, that fact, in connection with the other facts proved, furnish strong evidence that they were willing that Schoyer should, as the party deemed most interested in the result, contract for freight and agree upon the rate to be paid, and allowed him to do so, on the idea that the payment of the \$8,000, with the freight to be earned, whatever it might be, would save them from loss, in any event, from the results of the voyage.

The admission by the plaintiff, that the advertisement, exhibit "G," was published in the newspapers named, and for the periods stated, must be regarded as an admission that it was published with the knowledge and assent of Brown & Codman as well as of Schoyer, and that they had conferred upon Hunter the authority which it imports.

Exhibit "G" implies that it was expected the shippers of goods would prepare the bills of lading to be signed, and the captain swears that they generally filled them up.

Bills of lading, filled up by Jones, were sent by him, long before the Clarendon sailed, to the office of the advertised agent, with whom he had arranged the rates of freight to be paid. The defendants were not permitted to show, either what Hunter, the advertised agent, or Schoyer, the equitable owner, said in respect thereto.

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There is no pretense that Jones had any communication with the master as to the shipping of the goods or the freight to be paid, or that the master or any one in his behalf or on behalf of the legal owners intimated to Jones that the property would not be carried on the terms agreed on by Hunter, although the master was advised by the bills of lading which Jones sent to be signed what he understood or claimed the contract was.

I think that the evidence given as to the authority of Hunter to act for the ship in the making of contracts for carrying merchandise is sufficient, unexplained, to bind the owners, and that the contract he made must be deemed to be the one on which the goods were shipped by Jones, and on which the owners agreed that they should be carried to San Francisco.

The advertisement, exhibit "G," holds out Hunter, Smith, and the "agent on board at Pier 4, North River," as possessing the same power as "the captain," in respect to contracting for freight for the carriage of goods on the Clarendon from New York to San Francisco.

This view makes it necessary to grant a new trial.

What the rights of the parties, growing out of the sale of the cargo, may be, assuming the contract for the transportation of the goods to be such as the answer alleges it was, or such as exhibit "J" imports, cannot be determined upon this appeal. The cause has not been tried on that theory; and if the contract shall be proved, on a subsequent trial, to be such as is above suggested, other evidence may be given which will so vary the case from that presented by the present appeal as to render any principles, applicable to the case now made, irrelevant to that which may be finally established.

We are inclined to the opinion, however, that, if it shall be made to appear that anything was earned by the carriage of these goods which the defendants are liable to pay, the present plaintiff is entitled to receive it, if it shall also be made to appear that Merritt & Trask had furnished supplies for the ship while in this port which went to her use, and that the master accepted their order, with the knowledge of Schoyer and Codman, and with the intent to appropriate thereby the freight, to be earned by the carriage of the goods in question, to the payment, *pro tanto*, of their claim for such supplies.

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If such was the transaction, the equities of Merritt & Trask, and of the plaintiff as their assignee, as against Brown, Codman and Schoyer, are as clear and strong as if exhibit "A" had truly expressed the actual contract for the carriage of the goods.

On such a state of facts, we are inclined to think the plaintiff may justly claim that he should not be defeated in his action to recover any freight actually earned, (if any has been earned by carrying the goods,) merely because the contract for carrying them was different in its terms from what Merritt & Trask supposed it was when they received the captain's acceptance of their order, and on the faith of which they may have forbore to resort at the time to other remedies which would have secured, in whole or in part, the payment of their claim.

But this is a question which, for the reasons already stated, we do not think it expedient to attempt to decide on the case as it is now presented.

There must be a new trial, with costs to abide the event.

Ordered accordingly.

WILLIAM J. BARNES, Plaintiff and Appellant, v. EDWARD ROBERTS, Respondent.

1. A motion for a new trial on the ground of surprise, cannot be made as a matter of right, after judgment has been perfected.
2. A real estate broker, employed by the defendant to effect or negotiate an exchange of certain of the defendant's real estate for other specified property, at given prices, does not become entitled to commissions until he obtains a contract which his employer accepts, or such a contract as his employment authorizes him to negotiate, made with some third person, which the latter is able and ready to perform, or the specific performance of which can be compelled.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONROE, J. J.)

Heard, April, 11; decided, June 25, 1859.

THIS is an appeal by the plaintiff from a judgment of nonsuit ordered at a trial had before Mr. Justice WOODRUFF and a jury,

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in November, 1858, and also from an order denying a motion made for a new trial on the ground of surprise.

The substance of the complaint is, that in May, 1854, the defendant "employed one Joshua Barnes as a broker to negotiate a purchase for, and a sale to the said defendant of certain lots of land situate on Forty-fourth and Forty-fifth streets, in the city of New York, of great value, to wit, of the value of \$22,100," and agreed to pay therefor the usual brokerage commissions, at the rate of one per cent on that sum, being \$221; that on or about the 24th of May, 1854, Joshua Barnes, as such broker, effected such purchase and sale, and thereby became entitled to the \$221, which the defendant refused to pay. The plaintiff sues as the assignee of this cause of action.

The answer is short. It denies "each and every allegation contained in the complaint."

At the trial the plaintiff produced a written account or bill, in these words, viz.:

"NEW YORK, September, 1855.

MR. EDWARD ROBERTS

"To JOSHUA BARNES, *Dr.*

"House and Land Agent, No. 514 Sixth Avenue, between 33rd and 34th streets.

"1854.

"May—To selling three brick houses and lots, Nos. 168, 170 and 172 West Thirty-ninth street, to Mr. James Travers, at \$21,000,..... \$210 00"

Underneath it was a written assignment by Joshua Barnes, dated Sept. 1st, 1855, of all his "claim and interest in and to the foregoing bill against Edward Roberts," to the plaintiff.

Joshua Barnes, was examined as a witness for the plaintiff, and testified that the defendant, in or about March, 1854, employed him to sell or exchange some property on the south side of Thirty-ninth street, between Seventh and Eighth avenues, New York city. "He asked me to sell or exchange for vacant lots; I showed him some property I had for sale for Mr. Travers in Forty-fourth and Forty-fifth streets, between Tenth and Eleventh avenues;" that he subsequently introduced the defendant to Tra-

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vers. He further testified: "I think it was in March; in April I called to get a proposition in writing; he then made that offer on the card; I wrote it, and he signed it."

The said card and offer were then read in evidence, as follows, viz.:

(Card.)

"BARNES & CAMP,

"House and Land Agents,

"No. 430 Eighth Avenue,

"between 32d and 33d streets.

"JOSHUA BARNES, }
 "THEODORE D. CAMP, } New York.

"All business connected with real estate faithfully attended to.

"Office hours from 7 A. M. to 7 P. M."

(On the back of this is written with pencil:)

"I make this offer for 17 lots on 44th and 45th streets, subject to \$15,000 mortgage, at \$1 300 each—give my three houses, 168, 170, and 172, 89th street, \$7,000 each—balance on bond and mortgage two years.

"New York. 14th April, 1854.

"E. ROBERTS."

Evidence was given by Joshua Barnes with a view to prove that the defendant agreed to purchase these seventeen lots from James Travers, and that Travers, as part of such agreement, contracted to purchase defendant's three houses, 168, 170 and 172, Thirty-ninth street.

A written and sealed agreement was put in evidence by the plaintiff, dated the 24th of May, 1854, "between James Travers, of the first part, and Joshua Barnes, acting as the agent of Edward Roberts, of the second part." It was signed, "James Travers, [L. s.,] Joshua Barnes, Agent for Edward Roberts [L. s.]"

By the terms of this agreement "the party of the first part" sold to "the party of the second part," the seventeen lots, for \$1,300 each lot, total \$22,100, "to be conveyed by a good and sufficient deed, subject, however, to three mortgages," for \$15,000 in

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all, and for the balance, viz., \$7,100, agreed to take in payment defendant's said three houses and lots, at \$7,000 each, total \$21,000, to be conveyed subject to three mortgages, for \$10,500 in all; and for the balance of \$3,400, that would be coming to defendant, mortgages on said three houses were to be taken, "each of the said mortgages to be accompanied by the bond of the said party of the first part," conditioned to pay the last named amount at the end of two years, with interest semi-annually at seven per cent, the deeds to be delivered on or before the 1st of July then next.

• Evidence was given on both sides as to what occurred between the parties prior and subsequent to the making of this agreement, which is sufficiently stated in the opinion of the Court.

When the plaintiff rested, a nonsuit was asked, because, (1.) "the complaint states J. Barnes caused the seventeen lots to be sold—variance in the proof; (2.) That the plaintiff's assignor cannot act as agent of both parties; (3.) That plaintiff has not shown title in Travers." "Motion denied, and plaintiff allowed to amend the complaint, to conform to the proof."

In the course of the trial, the defendant claimed that James Travers, on the 1st of February, 1854, conveyed the seventeen lots by deed to his daughter Hester Ann Travers, and James Travers having left Court during the trial, (it occupying over a day,) by stipulation in open Court, the defendant was allowed to read as evidence the notes of Mr. Daniel Lord, taken by him, of James Travers' testimony in relation to this matter, given on a trial theretofore had between the defendant and said Hester Ann Travers; the plaintiff's counsel insisting that the whole of such testimony should be read, to which the defendant assented, and the plaintiff's counsel then read the same to the jury, in the following words:

"James Travers, plaintiff—Deed to Hester Ann Travers—Assignment to his daughter: These papers were signed; the deed was signed in Mr. Fowler's office, a commissioner; the assignment in Anthon's office; after they were signed, delivered them—the deed to my daughter, the other deed to me.

"Q. At what date did you sign the deed?

"A. In February, 1854; I lost the deed from Engs; Engs would rather have my bond and mortgage than my daughter's;

the deed to my daughter was signed about the same day; delivered it the same day; the foreclosure—I forget the time; Roberts told me he would do what he said to Mr. Barnes, and let Mr. Barnes finish it up, and he would do nothing else; at Mr. Roberts' house; he alone present; this before the contract signed."

The deed from James Travers to Hester A. R. Travers, dated February 1st, 1854, was read in evidence.

Proof was given of judgments docketed in the County Clerk's office against James Travers, viz.: one March 25, 1853, for \$78.24; one January 8, 1851, for \$76.81; one January 3, 1852; for \$35.10; one December 2, 1851, for \$137.94; and one December 20, 1851, for \$147.63.

When the testimony was closed, the defendant's counsel moved for a nonsuit, "on the ground that Travers had no title to the seventeen lots when the agreement to exchange was made." The motion was granted, and the plaintiff excepted.

The plaintiff, after judgment was perfected, moved for a new trial on the ground of surprise, on affidavits, the particulars of which are sufficiently stated in the opinion of the Court. That motion was denied, and from the order denying it, and from the judgment, the plaintiff appealed to the General Term.

P. Y. Outler, for appellant.

L. J. Goodale, for respondent.

BY THE COURT—BOSWORTH, Ch. J. It is important to determine preliminarily whether the order appealed from was properly denied, for the reason that a motion for a new trial, on the ground of surprise or of newly discovered evidence, cannot be made after judgment perfected.

The trial of the action was concluded on the 17th of November, 1858, and judgment was entered on the 9th of December, 1858, its entry until that time having been delayed at the request of the plaintiff's attorneys. A notice that the plaintiff appealed from that judgment, was served on the 23d of December. On the 11th of January, 1859, notice of a motion for a new trial, "on the ground of surprise and newly discovered evidence," was

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served; the notice stating that the motion would be made on the 19th of that month. From the order denying that motion, the plaintiff has appealed to the General Term.

Prior to the Code, it was settled that a motion for a new trial on the ground of newly discovered evidence or surprise, could not be made after judgment perfected. (*Roosevelt v. The Heirs of Fulton*, 7 Cow., 107; *Jackson v. Chace*, 15 J. R., 354; *Rapelye v. Prince*, 4 Hill, 125.) Neither could it have been made on a case after judgment perfected. It became necessary for a party wishing to make such a motion, to obtain a stay of proceedings so that judgment could not be entered until the motion was made.

A bill of exceptions, *per se*, stayed proceedings and prevented the entry of judgment. It was only necessary to obtain a stay of proceedings by order until the settlement of the bill. This was the rule in force when the Code took effect, except that the act of 1832 (chap. 128, p. 188,) allowed judgment to be perfected, although a bill of exceptions had been settled, (unless a stay of proceedings was granted,) and the bill of exceptions to be argued, notwithstanding judgment had been perfected. (*Graham's Pr.*, 329.)

This practice, in force when the Code took effect, is as much the practice now as previously, when not inconsistent with the Code itself or the rules adopted under it. (Code, §§ 469, 470.)

The Code provides, in cases tried by jury, for "a motion for a new trial, on a case or exceptions, or otherwise," (§ 265,) and for an appeal from the order granting or refusing it, (§ 349,) and for an appeal from a judgment, as a substitute for a writ of error. (§§ 323, 348.)

Section 265 contains no provision allowing a motion for a new trial to be made under circumstances which, by preëxisting practice, would preclude a party from making such a motion. Now, as before the Code, a party wishing to make a motion for a new trial, on the ground of newly discovered evidence or surprise, must obtain a stay of proceedings to secure that right.

In *Mersereau v. Pearsall*, (6 How. Pr. R., 293,) the preëxisting rule was admitted to be such as I have stated, but the opinion was expressed that, under the Code, such a motion could be made after judgment perfected. That opinion seems to rest on the

considerations due to the supposed fact that prior to the Code judgment could only be entered in term time, and a defendant had four days in term, after rule for judgment had been entered, to make his motion, whereas judgment can now be entered in vacation; and to the idea that if not now permitted to move "after judgment, the defendant would practically be denied the benefit of such motions in all cases." (Id., 294.)

With reference to the assumption that judgment could only be entered in term, it may be observed, first, that in the case of trials in circuits held in term time, the prevailing party could file his circuit roll and *postea* at once, enter a rule for judgment, and four days thereafter perfect his judgment. The terms of the Supreme Court, for all purposes of entering rules for and perfecting judgments, continued four weeks. (2 R. S., 197, § 6.) The same difficulty attended the making of motions for new trials in such cases, as in actions tried under the Code.

But as early as June, 1840, judgments could be "entered and perfected at any time in term or in vacation." (Chap. 886 of Laws of 1840, p. 327, §§ 23 and 41.) The case of *Rapelye v. Prince*, (4 Hill, 125,) was tried in 1842, and the rule previously enforced was in no way modified or relaxed, because when that action was tried, judgments could be entered in vacation. The judgment in that case was perfected in vacation.

If a party is surprised by anything to his prejudice occurring at the trial, or if on the whole case he thinks injustice has been done to him, he knows it, at least, as soon as the verdict is rendered, and should apply for a stay of proceedings.

I think there is no just ground of complaining that such orders are not granted with sufficient facility to enable a defeated party to obtain a further hearing.

In the present case there is, properly speaking, no surprise. The defendant at the trial found himself without any evidence to prove that "James Travers had no title to the seventeen lots when the agreement to exchange was made," except such as by the plaintiff's permission he was permitted to give. That evidence was in writing. Before consent to its being read was given, the plaintiff knew what it was, and for what purpose its introduction was sought.

The plaintiff was nonsuited solely or partly in consequence of the evidence being given, which he consented might be so read. Under such circumstances there is no ground for expressing surprise at anything except the decision of the Court. That was excepted to, and, if erroneous, will entitle the defendant to a new trial, not on the ground of surprise, but because it was error to grant the nonsuit.

If the defendant could make such a motion, even after judgment perfected, when his delay to move earlier was excused, no reason is shown why James Travers was not immediately applied to for information as to the time he delivered the deed to his daughter, and notice of the motion sooner served.

This case furnishes no reasons for departing from the previously well settled practice, which we regard as being now in full force, that a motion for a new trial, on the ground of surprise or newly discovered evidence, must be made before, and cannot be made after, judgment perfected.

When, as a condition to staying proceedings, security is required to be given, and judgment is permitted to be entered, not absolutely, but as security merely, it is reasonable to hold that such an entry of judgment is not a bar to such a motion. (*Benedict v. Caffé*, 3 Duer, 669; Superior Court Rules adopted Jan. 18, 1851, Rule 8, p. 660 of 5th ed. of the Code.) In such a case the judgment is not absolute when it is entered nor so long as it stands as security only.

A motion for a new trial is not different in any of its material incidents from the like motion under the practice as it existed when the Code took effect. (*Morgan v. Bruce*, 1 Code R., N. S., 369.) The considerations or facts which, prior to the Code, would be a bar to such a motion, are so now, unless there be special cases which, by the Code itself, cannot now have that effect. If there be any such cases, newly discovered evidence, or surprise, as the ground of a new trial, is not among the number.

In a case tried by a jury, an appeal from the judgment under section 348, brings under consideration only questions of law. (Code, § 348.)

It follows, if these views are correct, that the order appealed from must be affirmed, and that in considering the appeal from

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the judgment we can look only at the exceptions taken by the plaintiff during the progress of the trial. The affidavits on which the order was made, and the facts stated in them, should be as absolutely excluded from the mind, in considering and determining the appeal from the judgment, as if made in some other cause between other parties.

Was the plaintiff rightly nonsuited? is the only question raised by the appeal from the judgment.

The paper of the date of the "14th April, 1854," did not authorize Barnes to execute, as agent of Roberts, the agreement of the 24th of May, 1854. At the most it authorized him to negotiate or effect such an exchange as that paper described.

There is no pretense that Roberts assented to the agreement of the 24th of May, 1854, as it was drawn.

Barnes testifies that Roberts, on being shown and furnished a copy of that agreement, said, "that he had painted his house in Thirty-ninth street, and had put in the gas, and that if Mr. Travers would pay for these, it would be all right."

There was never any agreement signed by Travers or Roberts, expressing this modification, even if it be true that Travers assented to it. It was not, therefore, in the power of Roberts to compel Travers to perform, specifically, the agreement as Barnes says it was assented to even if the title to the seventeen lots had been in Travers, because Travers never signed any such written agreement.

He never tendered a deed of the seventeen lots executed by himself or any one else, to Roberts. The seventeen lots were encumbered by judgments against James Travers. There is no evidence that Roberts knew this, when the agreement of the 24th of May, 1854, was shown to him, and these Travers neither discharged nor offered to discharge. He never offered to pay for painting the house in Thirty-ninth street, or for putting in the gas.

On the evidence contained in the case, he was unable to perform the contract, at any time after the negotiations with him were commenced. There is no pretense that these were commenced earlier than in March, 1854.

James Travers bought these lots for his daughter, of P. W. Engs, and took a deed of them, dated the 1st of February, 1854, executed his bonds and mortgaged the lots, to secure the purchase

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money in whole or in part, and by a deed of the same date, conveyed them to his daughter.

Barnes admits that he knew, on the 24th of May, 1854, that Travers had bought these lots for his daughter, but says he did not then know whether she owned them or not. He says he did not know that Travers had a lot of judgments against him.

The defendant testified, that near the 1st of May, 1854, he went to Barnes' office several times "to see if arrangements were to be carried out." Barnes told him, "he supposed Travers had backed down." After that the defendant rented his house, and conditionally sold one. After this and about the 22d or 23d of May, 1854, Travers called on him to see whether he "would not do a little better with the trade." Roberts told Travers he "supposed the trade had been all given up, and that he had promised one lot to another party, and that if I (Roberts) did anything, he must take another house and pay for my expenses, and that the terms I had given to Mr. Barnes were the best terms I would trade upon."

Travers does not deny that these conversations were had. After this the contract of the 24th of May, 1854, was signed. Roberts says he immediately went to Barnes' office and told Camp, a person there, and Barnes, that he would not act on the contract. That Travers called on him again in a few days, when he told Travers the same thing, and on Travers denying his statements he showed him the door, and heard no more of the matter until the 29th of June, 1854, when he received the note of Joshua Barnes, which was produced on the trial, to which he paid no attention. That note reads thus:

"Dear Sir—I am requested to state that Mr. James Travers will be ready on 1st July, '54, to complete contract.

"Your ob't,

JOSHUA BARNES,

"Agent for James Travers.

"To Mr. EDWARD ROBERTS."

Travers does not deny any of these matters, which Roberts testifies occurred between them.

The evidence furnishes some grounds for inferring that Barnes and Travers were not deceived or misled, but were conscious,

when they signed the paper of the 24th of May, 1854, that Roberts supposed the whole negotiation was at an end, and knew he would not assent to a contract on those terms, but had some idea that the writing of the 14th of April, 1854, put it in the power of Barnes to bind Roberts by the contract.

Roberts' signature to it might as well have been had as Barnes', if he was willing to enter into such a contract; and Mr. Chamberlin suggested to them, when preparing, or about to execute it, "that Roberts had better be there."

The evidence does not justify the conclusion that Barnes had accomplished any result for which it was agreed he should be paid, or which entitled him to commissions.

He never obtained from Travers any written contract to which Roberts assented. He did not, therefore, either effect a sale or exchange of any lots, nor any agreement for a sale or exchange, which his principal accepted.

He never made any contract, verbal or written, or partly verbal and partly written, which Travers is shown to have been able to carry into effect. On the contrary, the evidence shows that he was not able to perform, on his part, the contract which Barnes says he assented to; and he never contracted in such form that he could have been compelled to perform it, even had the title been in him, and the lots been free from the incumbrance of the judgments.

A broker, like any other person who seeks to recover a fixed sum on the ground that he was employed to do a particular thing for a stipulated compensation, must allege, (and prove, if his allegations be denied,) what it was that he was employed to do, and that he has done it, as the terms of the agreement between him and his employer required.

The complaint alleges that he was employed to negotiate a purchase for and sale to the defendants of seventeen lots of ground.

If it is clear, upon the evidence, what precisely he was to do, to earn his commission, then I think it must be admitted that he was to negotiate the exchange which Roberts, by his offer of the 14th of April, 1854, written on the back of one of Barnes' cards, consented to make.

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It is one thing to agree with a broker to pay him a stipulated sum to obtain from a third person a valid contract to make a prescribed exchange, and another thing to agree to pay a fixed sum to effect or negotiate an exchange which will vest in the employer a good title to designated lots, subject only to specified incumbrances.

In the latter case, the commissions are not earned until the broker finds a person able and ready to make the exchange and convey to his employer the title, which alone, by the terms of his offer and of the broker's employment, the principal of the latter agreed to take and has a right to demand.

Barnes gave no evidence on his behalf justifying the conclusion, nor does all the evidence given justify the conclusion, that he negotiated an exchange with any person who was able to convey such a title to the seventeen lots as Roberts ever agreed to take.

Nor does it warrant the conclusion that he ever obtained a contract obligatory upon Travers to which Roberts ever assented, much less one which Roberts agreed with Barnes to accept as performance by the latter of the services which he was to render as a condition to his right to be paid commissions.

There was, therefore, no question of fact to be submitted to the jury.

The plaintiff was permitted to amend his complaint, (as I understand the object of the amendment,) to enable him to prove that he was employed to negotiate an exchange of enumerated lots, and that he had done all he was employed and undertook to do, and therefore had earned the stipulated compensation.

As the evidence was not sufficient to warrant a verdict finding that he had negotiated an exchange upon the terms that he was authorized to negotiate it, or that he had succeeded in inducing any person, having a title to the seventeen lots which, if the exchange was effected, were to be conveyed to the defendant, subject to specified incumbrances only, to make a conveyance which would vest such a title in the defendant; or that he had made a valid contract with any person to exchange on the proposed terms who was able and ready to perform such contract on his part; or that he had made any agreement with any person

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which Roberts accepted as performance by the broker of the stipulated services which he was to render, the plaintiff was properly nonsuited.

Whatever may be the ground on which the nonsuit was asked, yet, inasmuch as it does not appear that the judge assumed to nonsuit on any one specified ground only, I think it a just view to take that he granted the motion because he was clear that, on the whole case, the plaintiff was not entitled to recover.

If the views above expressed are correct, it would be our duty, if he had refused to nonsuit and his decision had been excepted to, and he had submitted the cause to the jury and a verdict had passed for the plaintiff, to grant a new trial.

I think the judgment should be affirmed.

HOFFMAN, J., dissented from the conclusion above expressed in relation to the appeal from the judgment. MONCRIEF, J., concurred with the Chief Justice.

The order and judgment appealed from were affirmed.

WILLIAM RIDER and JONA. TROTTER, Assignees, &c., Plaintiffs
and Respondents, v. THE UNION INDIA RUBBER COMPANY,
Defendants and Appellants.

1. Where the chattels of one, by his consent, come to the possession of and are used by another until worn out and rendered valueless, the owner may recover the fair value of such use, unless it be proved that the permission was given and accepted as a gratuity, and without any expectation of reward therefor.
2. The owner may recover for such use, although it was begun and continued in the mutual expectation that the party so using the chattels would purchase them, and notwithstanding the managing agent of such party, under whose direction the use was made, in good faith believed that his principal had purchased them.

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3. But the statute of limitations is a bar to a recovery for the use for any period antecedent to six years before action brought.
4. When an agent or officer of a corporation, in good faith, in the proper discharge of his duty, applies his own money or makes use of his own chattels for the proper uses of the corporation, he may recover for such money or such use.
5. Although an agent or officer cannot, as such, make a contract with himself, and so bind his principal to himself, his principal is nevertheless bound to pay for property used by his agent, in the faithful discharge of his duty, for purposes within his authority, and the measure of compensation is the fair value of the property so used.
6. Although the by-laws of a corporation require the officers and agents to enter all the business of the Company in its books, their neglect to do so (though it may subject them to liability if the Company sustain damage from such neglect) will not operate as a forfeiture or otherwise to deprive such officers of a just compensation for the use of chattels furnished by them to the corporation for the purposes of its business.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 6th; decided, July 9th, 1859.

THE judgment recovered by the plaintiffs in this action having been reversed and a new trial ordered at the February Term, 1859, the action was again brought to trial on the 20th of April, 1859, before Mr. Justice SLOSSON and a jury. The pleadings and most of the facts appeared as stated in the former report. (4 Bosw., 169.)

The plaintiff formally waived any claim to recover the value of the chattels mentioned in the complaint, and sought to recover so much as the use thereof by the defendants was reasonably worth.

It was shown that the plaintiffs, at the time the articles went into the possession of the defendants, were two of the five trustees mentioned in the defendants' certificate of incorporation, by whom the Company was controlled and managed, and the one was also President and the other Treasurer of the corporation. Emory Rider was also a trustee, and was the manager of the manufacturing department of the Company's business, and he took possession of and used the articles in question, with the knowledge and assent of the plaintiffs, to whom they belonged, as assignees of a former firm of Goodyear & Ely. Emory Rider knew that the articles never belonged to the firm of Rider & Brothers, and that they were not included in the purchase made

by the defendants when they (through their President) bought the machinery, tools, &c., of that firm for \$30,000. But Emory Rider, the managing agent, also knew that it was the expectation of the plaintiffs, as assignees of Goodyear & Ely, to sell these articles to the defendants, and supposed that the defendants had purchased them from the plaintiffs.

The defendants objected to any oral testimony that the property in question was not included in the purchase from Rider & Brothers, and also to any testimony to prove what the use of the articles was worth.

The record of a former judgment between the same parties, in which it was found and adjudged that the defendants did not purchase the property from the plaintiffs, was given in evidence. The defendants waived any claim that they ever purchased the property from the plaintiffs, but insisted, (notwithstanding the testimony of Emory Rider, above mentioned, and that of other witnesses to a similar purport,) that the articles were included in their purchase from Rider & Brothers, made December 4th, 1848.

The by-laws of the Company were given in evidence. The 5th and 8th contain the following provisions:

"5th. The duties of the President shall be to preside at all meetings of the corporation and trustees, sign all certificates of stock, make all purchases for the corporation, superintend the sale of all the goods of the Company for cash, or on time, according to his best judgment, and turn over the proceeds as fast as received, whether in cash or paper, to the Treasurer; employ and pay such persons as may be necessary to carry on the business in his charge, and discharge them at pleasure. * *

"8th. All business done for the Company by any officer, agent or servant of the Company, shall be done in the name of the Company, and entered on the books of the same." * *

Other facts also appearing on the former trial will be found noticed in the opinion of the Court.

The defendant's counsel then moved that the complaint be dismissed on the grounds:

1st. It is in proof that the defendants commenced using the property in November, 1848, and demand was made October 1st, 1855 or '56, and therefore no action could be brought for the property.

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2d. There is no proof of hiring, and no rent or value of use can be recovered unless there be a hiring.

3d. The plaintiffs not being able to recover the property, cannot recover for the rent.

The motion was overruled, and an exception taken upon each ground by defendants' counsel.

After counsel had summed up the case, the Judge charged the jury as follows:

The defendants claim that they took possession and have used the property as purchasers thereof from Rider & Brothers, under the resolution of November, 1848, that they took possession as purchasers, with the consent of the plaintiffs and of Rider & Brothers, in the belief that all such articles were included in the purchase from Rider & Brothers.

If the plaintiffs included in their purchase from Rider & Brothers the articles in question, or if they acquiesced in the payment of the \$30,000 by the defendants, and consented to their taking possession and using the articles under the belief that such articles were included in the purchase, they are now estopped from claiming title in themselves as assignees of Goodyear & Ely, and cannot recover for the articles, and the defendants will be entitled to a verdict.

If, on the contrary, the articles were not included in the purchase, and the plaintiffs did not acquiesce in the payment of that sum by the defendants, nor consent to their taking possession of and using the articles under a belief that the articles were included in the purchase, then the plaintiffs are entitled to recover the value of the use for the period during which the property was used, within six years anterior to the commencement of this suit, (October 10, 1856,) as you shall find that value to be under the evidence, with interest from the commencement of suit.

The defendants except to that part of the charge which allows a recovery for the use for any portion of time—more than six years having elapsed since they began the use, and also as to that part which allows the jury to find interest, it being an unliquidated account.

The jury found a verdict for the plaintiffs, assessing their damages thus:

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For the use of the property,.....	\$500 00
For interest thereon,.....	88 50
	<hr/> \$588 50

The defendants moved for a new trial, which was denied, and from the order, and also from the judgment entered on the verdict, the defendants appealed.

A. Thompson, for the defendants, (appellants.)

I. It is clear that the plaintiffs were the assignees of Goodyear & Ely, and that the property named in the complaint was in the possession of the plaintiffs as such assignees prior to the incorporation of the defendants; that part of it was on Rider & Brothers' premises at Harlem, intermixed with their property, and more or less used by Rider & Brothers, till the defendants purchased from Rider & Brothers all the property used by them, through their president, Trotter, December 4, 1848.

It is also clear that the residue of the property was in Rider & Brothers' possession, 71 Liberty street, and that the same was removed to the defendants' premises by the plaintiffs.

II. It is also clear that the defendants were incorporated September 29, 1848.

That all the stock taken at its formation, and up to December 4, 1848, was taken by Trotter and Rider & Brothers, being \$170,000, and which was paid for in property purchased by resolution of November 15, 1848, and that Jonathan Trotter was the President, William Rider the Treasurer, and Emory Rider the Factory Manager, and John Rider the Assistant Factory Manager, and that the defendants never purchased or hired any part of said property from the plaintiffs, (assignees of Goodyear & Ely;) but that Trotter, William Rider, Emory Rider, and John Rider, shortly after the defendants' incorporation, (they being then the virtual owners of the incorporation,) commenced using the property named in the complaint that was at Harlem, and continued its use till after they had sold out their stock, and that they wore out the property by such use, (except what Trotter took and sold in October, 1855,) before the plaintiffs ever raised any question respecting the property, and then by their suit of October 2d, 1854, they claimed, as assignees of Goodyear & Ely,

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to have sold it to the defendants in January, 1849, which was decided against them.

III. The defendants claim that the articles were obtained by them under the purchase of 4th December, 1848, but that, if not so purchased, the plaintiffs are estopped from denying a purchase; and this claim is well founded. Because:

1st. The plaintiffs originated the incorporation of the defendants for the purpose of disposing of their India rubber property, put out their prospectus, and did, by the resolution of 15th November, 1848, and contract of December 4th, 1848, sell all such property to the defendants, without reservation, "and other fixtures used by them in and about their rubber manufactory at Harlem."

2d. The plaintiffs continued the controlling officers of the defendants, using the same articles, for more than six years, without an intimation that the defendants did not purchase this property. (3 Paige, 554; 18 Barb., 437; 19 Wend., 563; 16 Barb., 613; 1 Johns. Ch., 354.)

3d. The fifth by-law and eighth by-law show the manner in which purchases should be made; and the defendants purchased by resolution—the parties not being able to buy and sell to themselves, nor to hire their own property to themselves. (20 Barb., 468.)

4th. Rider and Trotter caused a confusion of goods, and if there be a loss they must bear it. (2 Kent, 364, 365.)

5th. The plaintiffs do not claim to have hired this property to the defendants.

IV. The part of the charge not excepted to is in accordance with the former decision of this Court on the former appeal, and if the case be looked at, independent of the testimony of Trotter and the three Riders, the two first paragraphs of the charge are clearly made out in favor of the defendants; but the Judge erred in admitting improper testimony to show what the defendants purchased, or believed they purchased, and to which the defendants excepted. Because:

1st. Corporations can only speak or express their intentions by their corporate seal, or resolution. (2 Kent Com., 289-292.)

2d. Trotter & Riders knew the by-laws, which prohibited anything being done, except it was entered on the books of the

Company, and they have entered nothing showing what was included, or intended to be included, in the defendants' purchase of November 15 and December 4, 1848, except the resolution.

3d. Those four witnesses are swearing to an intended contract that could not be made in accordance with the by-laws or the law of the land. (20 Barb., 468; 6 Pick., 198; 7 N. H., 446.)

4th. These four witnesses, while swearing to their own knowledge or intentions, cannot swear to the knowledge or intentions of the Company, not having obtained such knowledge as agents of the Company. (20 Barb., 468.)

5th. There is no proof of ratification by the defendants of any act of these four witnesses, and even ratification would not make a contract which cannot legally be made. (17 N. Y. R., 453.)

V. The Judge authorized the jury to find for the plaintiffs (in a certain event) the value of the use of this property for six years anterior to the commencement of the suit. This part of the charge was excepted to.

The Judge refused to dismiss the complaint, which was excepted to.

The Judge allowed evidence of the value of the use, which was excepted to.

These exceptions are well taken. Because:

1st. Value of the use—is, in plain English, rent; and there is no action known in the law for rent or use or value of use, unless there be an agreement creating a tenancy, or hiring, express or implied. (6 Johns., 46; 1 Cow. Trea., 154; 13 Johns., 489; 2 Saun. Pl. and Ev., 78; 13 Johns., 240; 25 Barb., 243; 1 Denio, 37.)

2d. The facts show there was no hiring.

3d. There could be no hiring by law. (20 Barb., 468; 17 N. Y. R., 453.)

4th. There can be no implied contract where there could not be an express contract. (17 N. Y. R., 453.)

5th. The previous decision of the Court is, that the defendants did not tortiously take possession of the property.

The proof shows that the plaintiffs caused it to be used; a voluntary courtesy for which they cannot charge. (20 Johns., 28.)

6th. There being no possibility of a contract, one cannot be made by a demand of the property; the defendants not being guilty of a tort before the demand, could not be guilty of one till

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they refused to give up the property; but they gave up the property. (3 Hill, 348.)

7th. The statute of limitations is well pleaded to the whole complaint, therefore there never was a tortious taking.

8th. The plaintiffs probably imagine there was a tort committed by the plaintiffs as defendants' authorized agents upon the property, (2 Kent Com., 284,) which they can waive and bring assumpsit; but there being no tort, they waive nothing.

The law is uncertain whether assumpsit can be brought in any such case, unless the property be sold and turned into money; but it seems certain that there must be an express or implied contract as well as a tort, before the tort can be waived, and a suit instituted on the contract. (5 Denio, 370.)

But there can be no implied contract where there could not be a contract. (17 N. Y. R., 458.)

VI. The Judge erred also in directing the jury to find interest; as the claim was in every sense an unliquidated one.

John T. Hoffman, for the plaintiffs, (respondents.)

I. This is a fair case of bailment of chattels for a compensation, and possesses all the ingredients which are essential to a contract for hire. (Story on Bailments, ch. ent. "Contracts of Hire.") The defendants used and enjoyed the plaintiffs' property. And the law implies a promise on their part to pay for the use, in recognition of that "universal obligation which rests upon every man to render a just equivalent for the use of that which does not belong to him."

II. The defendants insisted that no hiring was proved, and, therefore, no "*rent* or value of use could be recovered," and thus confound "*rent*," which is a profit issuing out of lands, &c., with "value of use," which appertains to a bailment of chattels. The cases cited showed that rent could not be recovered unless the relation of landlord and tenant was proven to exist. It is needless to say they have no bearing upon the point in question.

III. Because the law would not recognize a purchase by Rider and Trotter as trustees of the Company of themselves as trustees of Goodyear & Ely, it does not follow that it will permit the Company to have the gratuitous use of the property, and deny all relief to the estate to which it belongs.

IV. Interest was allowed from the commencement of the action. The demand was no more unliquidated than any demand arising upon a *quantum meruit* or *valebant*. The defendants were in default from the commencement of the action. The verdict which fixed the amount of value related back to that period, and interest from that time is essential to plaintiffs' indemnity. (*McIlvaine v. Wilkins*, 12 N. H., 474; *Doyle's Adm'rs v. St. James' Church*, 7 Wend., 178; *Feeter v. Heath*, 11 id., 479; *Rens. Glass Factory v. Reid*, 5 Cow., 587.)

V. The questions of fact in the case were submitted to the jury precisely in conformity with the opinion of the Court rendered on the previous appeal, and the finding of the jury was fully warranted by the evidence.

BY THE COURT—WOODRUFF, J. It must be deemed established that the defendants did not purchase the articles for the use of which a recovery has been had by the plaintiffs.

That those articles belonged to the plaintiffs, as assignees of Goodyear & Ely, is not controverted. It is not claimed by the defendants that they made any purchase thereof from the plaintiffs. There was no evidence given on the trial that the articles were in fact included in the purchase made by the defendants from Rider & Brothers: on the contrary, the proof is full and uncontradicted that they were not included in that purchase. The jury have found that the plaintiffs did not include them in that purchase, and did not acquiesce in the payment to Rider & Brothers of the purchase money, consenting that the defendants take possession thereof, and use them under the belief that they were included in such purchase.

There was no evidence given on the trial that any agent or officer of the defendants ever supposed that the defendants had in fact purchased the articles in question from anybody, except in the testimony of Emory Rider, who says he expected the Company would buy it, and supposed that the Company had bought it from the plaintiffs, having himself proposed to do so to the plaintiff Trotter. If the judgment record in a former action which was read on the trial be regarded as showing that the plaintiffs once claimed that they had sold the articles to the defendants, the entire record conclusively establishes that they had not.

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The main fact stands, therefore, prominent and free from doubt.

The defendants came to the possession of the plaintiffs' goods, and by the plaintiffs' consent have used them for many years, until in fact they are worn out or nearly so.

There is no ground for saying that either the possession or use of the property was tortious, for the owners were consenting to both.

Upon this fact alone, if the question arose between two individuals, it would not be doubtful that the party so using the other's property was bound to pay what such use was reasonably worth, unless it was clearly shown that the permission to use was given and accepted without any expectation of reward therefor.

Here there was, on the part of the plaintiffs, and on the part of such agents of the defendants as are shown to have been aware of what was done, an expectation that the defendants would purchase the articles; so that there is no ground for saying that the plaintiffs or the agents of the defendants at any time supposed the plaintiffs were not to receive an equivalent for the property. No purchase having been actually made, the property was used by the defendants, the plaintiffs consenting to such use.

It is, however, insisted that the relation which the plaintiffs bore to the defendants forbids the idea that the defendants contracted with them to pay for the use of the property; that if there could be no express contract, none can be implied; that the plaintiffs, by voluntarily suffering their property to be used in common with the property of the defendants, and without any express contract for payment, have only confused their goods with those of the defendants, and must bear the loss, or, at most, it should be treated as a voluntary courtesy, out of which no claim to compensation arises.

The act of incorporation declares that the Company (the defendants) "shall be under the control of and be managed by five Trustees, and the first Board of Trustees shall be composed of the following persons, viz.: Jonathan Trotter, Elihu Townsend, Nicholas Dean, William Rider, and Emory Rider, who shall manage the affairs of this Company until the third Monday of January, A. D. 1849, and until others are elected in their stead."

In the arrangement of their business under the by-laws, a manager and assistant were to be appointed, who should "have the

entire management of the manufacturing part of the business, under the direction of the President," &c.

The plaintiffs, Jonathan Trotter and William Rider, were appointed, the former President and the latter Treasurer of the Company. Emory Rider was appointed Factory Manager and John Rider Assistant Factory Manager, and one Bellows was appointed Secretary.

In this state of the organization, the articles in question being held by the President and Treasurer, as assignees, and being at the Company's manufactory at Harlem, it is shown that the Company had use for the machinery, &c., (constituting the articles referred to,) for the purposes of their manufacturing department. Emory Rider, the Managing Agent of the Company, (knowing that the property was for sale, expecting that the Company would buy it, and, indeed, supposing at the time that the Company had purchased it from the plaintiffs, he having proposed to one of the plaintiffs that the Company should do so,) took possession of the articles and used them in the manufacturing business of the Company—the articles being such as are used in that business, and the Company having use therefor.

John Rider, the Assistant Factory Manager, was aware that the articles belonged to the plaintiffs as assignees of Goodyear & Ely. He was aware of the use thereof in the business of the Company. Whether the Secretary of the Company (Bellows) had any knowledge on the subject does not appear.

Three of the five Trustees of the Company under whose control and management it was, and their Assistant Factory Manager, knew the fact and assented to it, and although the other two Trustees are not shown to have been consulted, it is only just to presume that during the eight years the property remained in the use of the Company, they did their duty, so far, at least as to inform themselves on the subject, when nothing appears to have been clandestinely or fraudulently done.

Having thus had the beneficial use and enjoyment of the property by the owners' consent; there being no evidence of any expectation on the part of any one that such use was gratuitously furnished without expectation of reward, there seems no good reason why the defendants should not pay the fair value of such use. On the contrary, it is obviously just that they should pay

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such value unless there is some principle of law which deprives the plaintiffs of the power to demand compensation.

We perceive no rule of law which prevents the agents of the Company acting in good faith, charged with the conduct of the manufacturing department, making a necessary and proper use of the machinery in question, for the purposes of the business, merely because it belongs at the time to some other officers or agents of the Company. Had the managing agent of the Company so taken and used the property of a person having no connection with the Company, with the owner's consent, and such use had been actually known to and approved by several officers of the Company and acquiesced in by all, and had continued for several years, without dissent or objection, it would be rather late to raise the objection of want of power in such agent to bind the Company to pay a fair and reasonable compensation for such use.

How then does the fact that Trotter & Rider, the owners of the property, were at the time President and Treasurer of the defendants, affect the question?

In the first place it was not their sole act. The very person who, by express appointment of the Trustees under the by-laws, had the "entire management of the manufacturing business," took the articles for use and used them for the Company, and the continued acquiescence of the Company for several years, so far as appears by any proofs given by the defendants, sufficiently indicates approval, unless they be assumed to have been grossly inattentive to their duties. So that in this aspect Emory Rider must either be taken to have acted in pursuance of authority sufficient to bind the Company; or if his powers did not extend to the use of machinery of a third person under an implied obligation to pay for such use, then the continued use and the enjoyment of the benefit thereof by the Company are sufficient to amount to a ratification.

But *secondly*. Viewing this transaction as the act of the President and Treasurer, in connection with the Managing Agent, the result is the same. It may be conceded for the purpose of this present point, that Trotter or Trotter & Rider as assignees, could not contract with Trotter as President of the defendants, nor with Trotter & Rider as President and Treasurer of the defendants; upon the principle that no person can make a contract

with himself, or that an agent cannot bind his principal to a contract with himself, or that a trustee cannot bind the trust estate by a contract for the benefit of himself in his own right nor in any other capacity.

What follows? Not necessarily that, when he in good faith, in the proper discharge of his duty, parts with money or property which the purposes of the principal, or the exigencies of the trust estate require, such principal or such trust estate may have the use and benefit of such money or property without paying or allowing any compensation.

When an agent or trustee so acting makes a claim, it must undoubtedly appear that what was done was done in good faith, and for the benefit of the principal or of the trust estate. And where the nature of the transaction is such as to allow it, the principal or the *cestui que trust* has an option to disaffirm the transaction and restore the benefits derived therefrom. But moneys expended and property applied by the agent in the faithful discharge of his duty, and for purposes within his authority, must be paid for by the principal; and the claim of the agent to be paid therefor is as clear as his right to require for his services what they are reasonably worth, or as the right of a third person would be from whom the agent procured like property. It is true that the agent cannot by an express contract fix the price and terms, &c., with himself, and therefore all he could claim would be the fair value.

So here Trotter & Rider could not, on behalf of the Company, agree to pay Trotter & Rider a fixed sum for the use of the articles in question and bind the Company to pay that price, but if the articles were needed and were in good faith used for the benefit of the Company in the proper conduct of the business, we have no hesitation in saying that the Company was bound to make fair and reasonable compensation therefor.

The various questions of law urged upon our attention on the argument of the appeal, are chiefly in entire consistency with these views; the difference between our conclusions and the claim of the appellants lies chiefly in determining what rules of law are applicable to the facts proved and found.

It is doubtless true that a corporation cannot ratify an act of its agents which the corporation itself had no power to do. Nor an

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act which it could only do in a particular manner, where that mode is not pursued. This was held by us in *Brady v. The Mayor, &c.* (2 Bosw. R., 173.)

But here we perceive no want of power in the Company to procure and use any machinery necessary for the conduct of its manufacturing business, and, when so procured by its agents, to accept, approve, or ratify the act directly or by acquiescence.

It is true that the by-laws require that the agents enter all the business of the Company in its books, but their neglect to do so, (however it may subject the agents to censure or to damages if the Company suffer injury by the neglect,) does not make the act void.

So the law will not imply a contract where the corporation had no power to make an express contract to the same purport. (*Brady v. The Mayor, &c.*, *supra*, and *Peterson v. The Mayor, &c.*, 17 N. Y. R., 449.) But here no want of power in the corporation is shown, and the procurement and use of the property in question might be done by the agents of the corporation and might be approved or sanctioned in any of the modes in which a corporation may act in the exercise of its ordinary powers for the purposes of its legitimate business.

The previous decision in this case at General Term, (February 19, 1859,) sustains the charge of the Judge on the trial in all respects which relate to the question of title to the property itself, and the circumstances under which the plaintiffs would be estopped, to claim title to the property.

The exception to so much of the charge as allows a recovery for the use of the property, (which exception seems to proceed on the idea that because the use commenced more than six years before suit brought there can be no recovery for the use during any subsequent years,) was not strenuously urged on the argument. We perceive nothing in this part of the charge of which the defendant can complain. If one has by the consent of the owner had the use of another's property for ten years, no compensation being stipulated, certainly the statute of limitations, if it has barred the recovery of any part of the value of the use, cannot affect the liability for any sum which has accrued within the six years. (*Davis v. Gorton, adm.*, 16 N. Y. R., 255.) No part of a debt is barred by the statute which if a suit had been

brought six years earlier might not then have been collected, that is to say, which was not then payable.

The exceptions to the admission of evidence do not seem to us well taken.

The first is to the question put to the factory manager, whether, at the time the Company purchased from Rider & Brothers, he pointed out to the President the property held by him and Rider as assignees?

This question was proper, as tending to show that that property was not, as the defendants now claim it to have been, included in the defendants' purchase from Rider & Brothers. A similar observation may be made of the testimony of William Rider, that he knew what the Company bought of Rider & Brothers, and that that purchase did not include the property in question. This, also, went directly to one of the grounds of defense, and tended directly to establish the title of the plaintiffs to recover for the use of the property.

The objections taken to proof of the value of the use of the property are sufficiently disposed of by what has already been said. In the absence of an express contract fixing the price of the use, its fair and reasonable worth was the measure of the plaintiffs' recovery.

An exception was also taken to the ruling by which the record of a former judgment between these parties was admitted in evidence. We find nothing in the appellants' points in support of this exception. The record was competent evidence that although the defendants did not now claim to have purchased the property from the plaintiffs, the claim now in controversy was not a stale claim made after the lapse of many years under circumstances indicating that the plaintiffs were conscious either that the property was included in the sale of the machinery, &c., of Rider & Brothers, or that there never was any expectation on the part of either that the defendants should make any compensation for the property.

We think the order denying a new trial was properly made, and that there was no error committed on the trial.

The judgment, and the order denying a new trial, must both be affirmed.

Judgment and order affirmed, with costs.

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THADDEUS WILSON, Plaintiff and Respondent, v. EDWARD
ROBERTS, Defendant and Appellant.

1. Where, by a written and sealed contract between B and C, B covenanted to furnish the brown stone for eight houses, and set them by a certain time, for \$2,000, to be paid in notes of \$500 each, to be made by R, and delivered as the work progressed, and C agreed to pay therefor in such notes accordingly; and C drew an order on R to deliver such notes to B "when the stone is delivered according to the contract, and at such times as therein stated," and R afterwards accepted such order by an indorsement thereon signed by him, thus: "Accepted Oct. 17, 1856," the contract of R is one to answer for the debt or default of C, and the writing so signed by him does not express the consideration thereof, and is void by the statute of frauds.
2. R, in such a case, is not bound to deliver his notes to B, unless the latter performs his contract according to its terms.
3. C cannot, in such a case, extend the time for B to perform such contract, without the consent of R, without discharging R from liability.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 6; decided, July 9, 1859.

THIS is an appeal by the defendant from a judgment against him, entered on a verdict rendered on a trial had before Mr. Justice SLOSSON and a jury, on the 14th of May, 1858.

It was commenced on the 11th of April, 1857. The complaint avers that on the 15th of October, 1856, Thomas Beattie and William H. Cronk, by S. W. Cronk, his attorney, entered into a written and sealed agreement, by which Beattie, "for and in consideration of the covenants and agreements thereafter contained," agreed to furnish and deliver the brown stone for eight houses, and complete the houses by the 1st of November then next, for \$2,000, and that Cronk thereby covenanted "to pay for the same as follows: by delivering to said Beattie or his assigns, Edward Roberts' (the defendant's) notes at three months from their date, for the said sum of \$2,000, as follows:" one note for \$500 when the stoops to four houses are set; one note for \$500 when the stoops to four more houses are set; one note for \$500 when the doors to four houses are set, and the other note for

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\$500 when the stone for the eight houses is all delivered and set.

That on or about said 15th of October, 1856, Cronk made and delivered to Beattie an order in writing on said Roberts, reading thus:

"October 15, 1856.

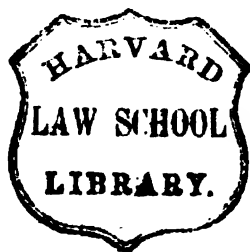
"Mr. E. ROBERTS:

"You will please deliver to Thomas Beattie, or order, the notes specified in the contract hereto annexed, made this day between Wm. H. Cronk and Thomas Beattie, when the stone is delivered to certain eight houses, according to the contract, and at such times as therein stated.

"W. H. CRONK, by his attorney, S. W. CRONK."

That "the defendant afterwards, and on or about the 17th day of October, 1856, duly accepted in writing." That the time for Beattie to perform the contract was, afterwards, with Roberts' assent, extended to the 21st of November, 1856, and that Beattie completed it within that time. That there was a failure and refusal to deliver the last note for \$500; that it was deliverable on the 1st of December, 1856, and would have been due on the 4th of March, 1857; that the defendant on that day became indebted to the said Beattie in the sum of \$500; and that by writing made and dated April 10, 1857, Beattie assigned the cause of action thus accruing to the plaintiff, and it prays judgment for \$500, with interest from the 4th of March, 1857.

The answer admits the making of the contract between Beattie and Cronk; the drawing of the order on Roberts; but denies due acceptance of it, and avers that the acceptance was indorsed on the order, and reads thus: "New York, Oct. 17, 1856. Accepted: Edward Roberts." It denies that the time for performance by Beattie was extended by his assent to November 21, 1856, or that the contract was performed by that time; or that the fourth note was deliverable on the 1st of December, 1856; or that the defendant at any time became indebted to Beattie in any sum; or that he assigned the alleged cause of action to the plaintiff. As a second and separate defense, it avers that the alleged acceptance is a promise to answer for the debt or default



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of another, and that the defendant's written agreement does not express the consideration thereof; and as a further and third defense, avers that "the said alleged acceptance was without any consideration, and is void."

At the trial, the contract between Beattie and Cronk, and the order on Roberts, accepted in the form stated in the answer of the latter, were produced and read in evidence. J. O. Higgins, subscribing witness to the contract between Beattie and Cronk, testified that "Beattie said he would not furnish stone without Roberts' notes; he would not sign that contract or do work without Roberts accepted the order. * * Beattie said he would not furnish stone unless he had the responsibility of Mr. Roberts." "The contract may not have been signed on the day of its date; it was signed before Mr. Roberts accepted; there may have been two or three days' difference in their dates." "I think the order was attached to contract when delivered to Beattie; to the best of my recollection, I delivered both together." S. W. Cronk, a witness for plaintiff, testified that he signed, as attorney of Wm. H. Cronk, a writing extending the time for Beattie to perform his contract twenty days from November 1, 1856; that this was not done with Roberts' consent; and that Beattie refused to sign such writing, saying he could not perform by the 20th; that the original contract was signed on the 15th of October, and that Roberts had no interest in it; that "Mr. Beattie went on and completed the stone work on the 9th December, 1856; stone was delivered on the 8th of December; it was all set on the 9th;" and that the witness had "refused to certify that the work was completed by the 20th of November, 1856."

There was some evidence tending to show that the reason why the stone was not all delivered on the 20th, was, that there was no place to dump it in front of the houses where it was to be delivered.

The Judge was requested to charge that, no consideration being mentioned in the memorandum signed by the defendant, it is void; and that an extension by Cronk of the time for delivering the stone made a new contract, and discharged Roberts. He refused to charge either proposition, and the defendant excepted.

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He charged that the contract was not within the statute of frauds. To this the defendant excepted.

He also charged that, whatever Cronk's rights might be, if Beattie failed to deliver the stone by the 20th of November, and Beattie had not waived such default, it is not a default which affects Roberts. To this the defendant excepted.

That "the failure to furnish the stone by the 20th was a default which, in the terms of the contract, does not go to the exoneration of Roberts." To this the defendant excepted.

That "Cronk and Beattie could extend the time of performance, but that would be no defense to Roberts. Roberts was not a surety, but an original undertaker for the delivery of his own notes; and this formed the consideration of the entire agreement of the plaintiff to furnish the stone."

"The plaintiff, when he has established the delivery of the stone and their setting, establishes a right to recover." The defendant excepted to the charge generally.

The Jury found a verdict for the plaintiff for \$542.08. Judgment having been entered on it, the defendant appealed to the General Term.

James S. L. Cummins, for appellant.

I. The order on Roberts by Cronk, and its acceptance by Roberts, is a guaranty. "A guaranty is an agreement not under seal, whereby one person engages to be answerable for the debt, default or miscarriage of another person." (*Farmer v. Hall*, 5 Denio, 487; *Rogers v. Kneeland*, 10 Wend., 220.)

1st. The agreement is within the statute of frauds. There was a valid agreement on the part of Cronk to pay these notes to Beattie, and the obligation which this agreement imposed upon Cronk was not released by Beattie when Roberts accepted the order of Cronk in favor of Beattie, but remained in full force and virtue. Therefore, if Roberts should fail to deliver the notes to Beattie according to the terms of Cronk's order, Beattie could hold Cronk under his agreement.

2d. Where the whole credit is not given to the person who is to answer for another, and when any portion of it is given to the person for whom he is to answer, the case is within the statute, and some notes, &c., must be in writing. (*Brady v. Sackrider*, 1

Sand., 514; *Matson v. Wharam*, 2 Term, 80; *Rogers v. Kneeland*, 10 Wend., 248; 13 id., 121.)

3d. There must be a written memorandum expressing the consideration, subscribed by the party to be charged. (*Parker v. Willson*, 15 Wend., 347; *Brewster v. Silence*, 4 Seld., 214, 215; *Bennett v. Pratt*, 4 Denio, 286; *Staats v. Howlett*, id., 559.)

II. The guaranty of Roberts was without consideration, and therefore void.

1st. It nowhere appears that Roberts was indebted to Cronk, or was bound to advance his notes to Cronk.

2d. It nowhere appears that Roberts had any interest in the contract to furnish stone to the houses.

3d. The contract with Cronk was not executed in consideration that Roberts would give this acceptance; the contract itself shows the consideration on which the stone was delivered, which was the promise of Cronk to procure these notes, and not of Roberts to give them; and no matter what parol understanding may have existed, it was merged in the specialty. (*Schermerhorn v. Vanderheyden*, 1 John. R., 140; *Allen v. Segrist*, 21 Wend., 628.)

4th. The acceptance was not given until Beattie had absolutely bound himself to deliver the stone by signing, sealing and delivering to Cronk his part of the agreement.

5th. Even if Beattie had executed the agreement to furnish the stone on his knowledge that Roberts had accepted this order, yet that would not have been a consideration which would have supported this action against Roberts; for, to be a valid consideration, it must be "one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made." (2 Kent, 465, marg.; *Jones v. Ashburnham*, 4 East, 455; *Lent v. Padelford*, 10 Mass., 236.)

Beattie is not a party to this acceptance, nor is there any pretense that Roberts was benefited or Cronk prejudiced by Roberts' acceptance.

III. If the acceptance is not void under the statute of frauds, and if there was a valid consideration, yet the last note was never due on the acceptance.

1st. It is a special acceptance to give the notes if the stone is delivered "according to the contract." It nowhere appears that

the contract was fully executed on 1st November. It was not executed until after 20th of November or 1st of December.

2d. The contract was never extended beyond 1st November. The contract is under seal, and could not be extended except by a sealed instrument. The extension is not under seal—never executed by Beattie—never went into effect. (*Delacroix v. Bulkley*, 13 Wend., 71; *Eddy v. Graves*, 23 id., 82; *Allen v. Jaquish*, 21 id., 628.)

3d. The so-called extension, (and acceptance of the work under it,) if properly executed by Cronk, being after a breach, may waive the liability of Beattie for damages; but it is a new agreement, not contemplated by the acceptance. (*Delacroix v. Bulkley*, 13 Wend., 71; *Eddy v. Graves*, 23 id., 82; *Allen v. Jaquish*, 21 id., 628.)

And in order to hold Roberts, a new promise to deliver notes under the new agreement must be shown, but it was not even done with his consent.

IV. The claim of Beattie against Roberts, even admitting a valid one existed, is no ground for a recovery by the plaintiff in this cause, for it has never been assigned; it is but a collateral to the principal contract and principal debt, which is the contract of Beattie with Cronk, and that contract is owned by Beattie, and not by the plaintiff in this cause. (*Jackson, ex dem. Barclay and Bayard v. Blodget*, 5 Cow., 202; *Pattison v. Hull*, 9 id., 747; *Langden v. Buell*, 9 Wend., 80.)

V. The Judge erred in refusing to dismiss the complaint.

VI. The Judge erred in refusing to charge, as requested, "that there being no consideration mentioned in the memorandum, it is void."

VII. The Judge erred in refusing to charge "that an extension of the time by Cronk in which the stone was to have been delivered makes a new contract and discharges Roberts, unless he made a new agreement to give the notes under this extended contract."

VIII. The Judge erred in charging that "this contract is not within the statute of frauds."

IX. The Judge also erred in charging thus: "If the stone was not all delivered by the 20th, is the defendant discharged from liability? This is a question to be determined by the contract

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itself. The defendant's undertaking is to deliver to Beattie a note for \$500 when the stone is all delivered and set to complete the eight houses. The failure to furnish the stone by the plaintiff was a default which, in the terms of the contract, does not go to the exoneration of Roberts."

X. The Judge erred in charging that, "whatever rights it might have given Cronk against Beattie, if he had not waived it, it is not a default that affects Roberts. He could not be called on to give his note till the stone was all delivered and set; and when that event did take place, he was bound by the terms of his agreement to give his note whether the stone was delivered by the 20th November or not."

B. W. Bonney, for respondent.

I. The rulings of the Judge at the trial, upon questions of evidence raised by defendant's counsel, were correct, and the exceptions to such rulings are not tenable.

II. The motion by defendant's counsel to dismiss the complaint was properly denied.

III. There was no error in the refusal of the Judge to charge as requested by defendant's counsel.

1. The agreement between Cronk and Beattie and the order on Roberts for the notes in the agreement specified and Roberts' acceptance thereof, were all parts of and constituted one contract, and show a sufficient original agreement for good consideration to deliver the notes.

Roberts was an original contractor, and not surety for Cronk. (*O'Donnell v. Smith*, 2 E. D. Smith, 124; *Leonard v. Mason*, 1 Wend., 522.)

2. An extension by Cronk of the time for delivering the stone could not affect the undertaking of Roberts to give the notes. It in no wise concerned or affected him. (4 Barb., 614, 616.)

IV. There was no error in the charge of the Judge at the trial, and none of the exceptions thereto are well taken.

1. The contract of Roberts is not within the statute of frauds. Roberts was an original contractor, and not a surety or guarantor for Cronk.

2. If the stone was not all delivered by 20th November, 1856, but was afterwards delivered and accepted and used by Cronk,

the default in time would not, under the circumstances, exonerate Roberts from his obligation to give the notes.

V. The exception to the charge generally is not well taken; it is not sufficiently definite to be of any avail.

VI. The judgment entered on the verdict of the jury should be affirmed, with costs.

BY THE COURT—BOSWORTH, Ch. J. By the contract of the 15th of October, 1856, between Beattie and W. H. Cronk, the former covenanted, unconditionally, to furnish and deliver certain kinds of stone for eight houses, and Cronk covenanted as unconditionally to pay therefor \$2,000, in notes made by the defendant at three months from their date; the notes to be delivered separately as specified in the contract. By the obvious meaning and clear import of this contract, the stone was to be furnished to Cronk; and by the terms of the contract it is equally clear that Cronk covenants to pay the contract price.

The complaint alleges that the order drawn by Cronk on the defendant "was made and delivered to Beattie" "on or about said 15th day of October, 1856," "which order the said defendant afterwards, and on or about the 17th day of October, 1856, duly accepted in writing."

By that order and the defendant's acceptance of it the defendant agreed to deliver to Beattie such notes as Cronk had covenanted should be delivered to him, when by the terms of such covenant Beattie should be entitled to demand them.

The liability of Cronk upon his covenant continued unaffected by the defendant's acceptance of this order. He remained liable absolutely and as principal.

In *Brewster v. Silence*, (4 Seld., 207,) the defendant, F. Silence, was sued as guarantor of "the payment of a note made by George Silence." The jury found (8d.) "That the consideration of the note was a pair of horses sold to George Silence by the payee of the note, and that a condition of the sale was that the note should be guaranteed by the defendant, and that the sale was not consummated until after the execution of the guaranty."

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(4.) "That after the execution of the note and guaranty, the horses were delivered by the payee, Thompson, to George Silence, who at the same time delivered the note and guaranty to Thompson." (Id., 209, 210.)

In the present case, the complaint treats Cronk as the principal debtor, as the complaint in that case treated George Silence as the principal debtor.

In that case the defendant was held to be not liable; the present case, if not as clearly within the statute of frauds as that, contains nothing which can exempt it from the operation of that statute. It is quite clear that the defendant's contract is collateral, and is an agreement to be answerable for the debt or default of another.

In the case of *Draper v. Snow*, (6 Duer, 662,) the complaint averred extrinsic facts of the same nature as those attempted to be proved in the present case, and with great fullness and precision; and on a demurrer to the complaint, judgment was given for the defendant.

The proof given in the present case, to the effect that "Beathe said he would not furnish stone without Roberts' notes; he would not sign that contract or do work without Roberts accepted the order," even had it also been proved that he said this to Roberts is wholly immaterial.

If this was in truth the consideration of Roberts' acceptance, his acceptance does not express that, nor any consideration for it, and is therefore void by the statute of frauds.

There is no averment in the complaint, nor any proof that, by agreement between all the parties, the stone was to be the property of Roberts when furnished. He is not liable for them as for stone sold and delivered to him.

We think Roberts' agreement is an agreement to be answerable for the debt of Cronk. What was the precise relation existing between him and Cronk, the evidence does not disclose.

The consideration of it may be that which the testimony of Higgins was designed to establish. But though that may be so, the order and acceptance when construed together do not express that to be the consideration. And if they do not express that, nor any other sufficient consideration, then *Brewster v.*

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Silence and Draper v. Snow are conclusive against the defendant.¹

For aught that is contained in the order or in the acceptance, the consideration may as well have been some pecuniary compensation paid to Roberts by Beattie or by Cronk, as that which the testimony given by Higgins was introduced to establish. A pecuniary compensation paid by either, would be consistent with anything that is stated in the defendant's contract.

A contract by one person to answer for the engagement of another, in order to satisfy the statute of frauds, must either state the consideration of it in direct and intelligible language; or its terms must be such as to import what the precise consideration is, as clearly as if formally stated in the most direct and explicit manner. (*Union Bank v. Coster's Exrs.*, 3 Comst., 204; *Draper v. Snow*, 6 Duer, 665.)

Even if it be true, as the plaintiff contends, that Roberts "was an original contractor, and not a surety or guarantor for Cronk," then the time within which Beattie was obliged to perform on his part, as a condition to his right to recover, could not be enlarged without the consent of Roberts. It certainly could not be if the defendant's position was that of surety.

This proposition is so obvious as not to require the citation of authorities in its support. The jury were instructed "that a failure to furnish the stone by the 20th was a default which, in the terms of the contract, does not go to the exoneration of Roberts." To this the defendant excepted.

This instruction withdrew from the jury the question whether Roberts had or had not assented; and by it they were told that any default on the part of the plaintiff was immaterial. If this be so, then Roberts would be liable, though the stone had not been furnished until after the lapse of one or more years.

We think this part of the charge is clearly erroneous.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

¹ See *Church v. Brown*, 21 N. Y. R., 215, 220.

BOYD, Plaintiff and Respondent, v. FOOT & COLE, Appellants
and Defendants.

1. In the taking and stating of an account between partners, in an action brought for that purpose, the mere fact that certain items were charged, after the dissolution of the firm, upon its books, to profit and loss, by some of the partners, is not of itself *prima facie* evidence against the other partners that they are items of loss properly chargeable to the firm.
2. Where, on such a stating of an account, it appears that all of the partners, except one who withdrew, continued the same business in the name of the old firm, and, subsequently to the dissolution, took a judgment from a dealer with the old firm as security for the whole sum then owing to the firm, and after that, settled with him and gave him a receipt in full. Such facts are *prima facie* evidence that they were paid in full the balance owing to the old firm at the time it was dissolved.
3. Where the capital contributed by the retiring partner consisted in part of a note made by a third person, and the continuing partners subsequently recovered a judgment on such note, and issued an execution which was returned satisfied, the presumption is that the continuing partners collected such judgment.
4. In an action by an assignee of one of three co-partners against the other two for an accounting, the defendants cannot set up as a counterclaim that in a transaction between them, and the retiring partner disconnected from the partnership business, they sold him goods and took therefor the notes of a third person, which, on a compromise and settlement with the latter, after discovering his insolvency, they surrendered to him; and that they were induced by the fraudulent representations of the plaintiff's assignor as to the solvency and credit of such third person to take the notes, whereby they were damaged. Such a cause of action is not one against the plaintiff, and for that reason is not a counterclaim as defined by the Code.
5. Where, on an accounting between partners in a suit brought for that purpose, two of the defendants claim that a note of a third person for \$500 was contributed by the other partner, and was credited to him as so much capital, and that only \$200 of it was paid, and that \$300 of its amount should be charged by the Referee to such other partner, and it is so charged, the judgment will not be reversed merely because the Referee received incompetent evidence tending to prove that it had been paid in full, as it is clear that receiving such evidence was not prejudicial to the defendants.
6. On such an accounting between partners, the defendants have the right to have each partnership transaction investigated, and its results embraced in the account to be stated, though there be no specification of it, or of the facts in respect to it, contained in the pleadings.

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7. Where, on such an accounting, a referee erroneously refuses to allow to the defendants the proper credit in respect to a particular item, the judgment will not necessarily be reversed. If the plaintiff chooses to stipulate to deduct the whole amount of the defendants' claim in respect to such item, the Court will order the deduction made, and affirm the judgment as to the residue.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 7th; decided, July 9th, 1859.

THIS is an appeal by Joel W. Foot and Charles Cole, (the defendants,) from a judgment in favor of George Boyd, (the plaintiff,) entered on the 14th of September, 1858, for \$1,415.79, and costs, on the report of Willis Hall, Esq., as Referee.

The action was brought in August, 1856, to recover a balance alleged to be due to the plaintiff's assignor, Henry C. Goodwin, as a member of the firm of Foot & Cole, alleged to have consisted of the defendants and of said Goodwin, and to have continued from October 1, 1855, to April 1, 1856, and to have been then dissolved by mutual consent.

The complaint states the formation of the partnership; the nature of its business; its duration; its dissolution; the stating of an account then between the partners; the finding of a balance of \$2,319.84 due to Goodwin, and a promise by the defendants to pay it; an assignment on the 26th of June, 1856, by Goodwin, of such claim to the plaintiff, and prays judgment for that sum, with interest from the 1st of April, 1856.

The answer takes issue upon all the averments in the complaint, and counterclaims for three items, viz.: *First*, \$700 damages for Goodwin's failure to furnish the amount of capital which he agreed to contribute. *Second*, \$835.04 for goods, &c., delivered at Painsville Mill, of which Goodwin was lessee; and, *third*, \$1,303.50 for inducing them, by false representations, to take notes made by John S. Dye for that amount, which were worthless. It also prays "that an account may be had between the said Goodwin and them, of and concerning all his rights as such co-partner, if, in fact, he be adjudged to have been such partner."

The plaintiff, by a replication, denied all the allegations of new matter, or by way of counterclaim. The Referee found that there was a partnership; that Goodwin was to have one-fourth of the profits, and bear the like part of the losses, and adjusted

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the accounts on that basis, and found the balance due to Goodwin, April 1, 1856, to be \$1,204.93, which, with interest to August 15, 1858, the date of the Referee's report, was \$1,415.79.

The defendants insist, (assuming it to have been correctly found that there was a partnership,) that they were entitled to various credits in the alleged partnership accounts which the Referee rejected; and also to two counterclaims; and for those causes they appealed. The items omitted and claimed by the defendants, are the Pittstown Mill account, and \$249.94, \$318.73, \$139.50, \$91.23, \$176.06, \$1,303.50, \$835.04. None of these were allowed by the Referee, except \$38.25 out of the \$249.94.

The Referee's finding, in respect to the matter of the second and third counterclaim, is as follows:

"ITEM SECOND—\$835.04 for goods, wares and merchandise delivered at Painsville Mills.

"Goodwin was the nominal lessee of these mills, but had no actual interest in them, or in running them, or in their management. They were paper mills, and Goodwin, before entering into the partnership of Foot & Cole, did their business in the city; that is, sent them rags, and received their paper for sale on commission. On forming that partnership, he closed his accounts, in his individual name, with the mills, up to the 1st of October, 1855, and the business of the mills, which was considered valuable, and was an inducement to forming the partnership, was conducted after that date by the concern of Foot & Cole, in the firm name. The party who was in possession, running the mills, received the goods from the concern of Foot & Cole, and was called upon by them to pay the account against the mills.

"The Referee is of opinion that the transactions of the Painsville Mills were on account of the partnership, and that Goodwin is not chargeable, except for one-fourth of the loss, \$208.76.

"ITEM THIRD—\$1,303.50. Notes of John S. Dye.

"Without entering into the question whether Goodwin was ever liable for these notes, it is sufficient that on the 10th of September, 1857, Foot & Cole, for valuable consideration, gave up these notes to the said Dye, and gave him a receipt in full of all demands to that date.

"This item cannot be allowed."

The facts in respect to the other items, which the defendants claim were erroneously rejected, sufficiently appear in the opinion of the Court, as does also the matter in respect to two exceptions taken by the defendants during the trial.

David Dudley Field, for appellants.

I. There were two exceptions, both of which were well taken. (These are noticed in the opinion of the Court.)

II. Assuming that the defendants and Goodwin were partners for a time, and that the accounts between them are to be adjusted on that basis, there are various credits to them, as charges to Goodwin, which should have been made, and which are specified in the following subdivisions :

1. Goodwin should have been charged with one-fourth of the loss on the Pittstown Mill. This mill was purchased while Goodwin was with Foot & Cole, and at his suggestion, for \$1,500, the whole of which has been lost. The Referee rejected this item, because not specified in the answer as a counterclaim. Clearly, that was not necessary. The transaction entered into the accounts between the alleged partners, and the loss in it, should be charged one-fourth to plaintiff.

2. Goodwin should have been charged one-fourth of the items in the profits and loss account on page 56, amounting to \$999.76, one-fourth being \$249.44.

3. Goodwin should also have been charged with one-fourth of the loss on J. S. Dye's account, accrued while Goodwin was with Foot & Cole, \$394.95 ; in the Catskill Mill account, \$558.85 ; in Reuwee's account, \$1,274.93.

The account, with the foregoing corrections, would show a balance of only \$81.94 in the plaintiff's favor.

III. Against the foregoing balance there should have been charged two independent items, by way of counterclaim, as follows :

1. The plaintiff should have been charged with the notes of Dye, amounting to \$1,303.50. The defendants sold to the plaintiff, on the 12th of September, 1855, goods to the amount of these notes ; and the plaintiff induced the defendant to receive Dye's notes for the goods they sold, representing them as good, when they were, in fact, worthless. The goods were charged to Good-

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win in the books of Foot & Cole, and so stood on the books while Goodwin was there. The only questions then are, 1st, whether Dye's notes were received as absolute payment; and 2d, if they were, whether Goodwin, by misrepresentation, induced Foot & Cole to take them. His own account of the transaction is clearly disproved. There is no evidence that the notes were received under an agreement that they should be taken as payment. There is, besides, abundant evidence of Goodwin's misrepresentations.

2. The debt against the Painsville Mill should have been charged to Goodwin. He had a lease of that mill, and was running it on his own account, and represented to Foot & Cole that it would be a great advantage to their concern. Foot & Cole sold goods to that mill, and charged them to "Painsville Mill, H. C. Goodwin. D. P. Squires, Agent." The loss was charged to Goodwin in the books while he was there. Goodwin's statement is disproved by the other witnesses. Charging these two items, there would be a large balance in the defendants' favor.

IV. If the testimony, in respect to the purchase of the Pitts-town Mill, should be thought imperfect, the reason is, the Referee's ruling that it was impertinent. The defendants excepted to that ruling, and for that cause, if there was no other, the report should be set aside, and a new trial ordered. The item insisted on was not a counterclaim, but an item in the partnership account as much as any other.

Chauncey Shaffer, for respondent.

This is an action to recover a balance of \$2,819.84, found due to the plaintiff's assignor, Henry C. Goodwin, on the occasion of his selling out his interest in and retiring from the firm of "Foot & Cole." From the agreement proved, it appears that Foot & Cole were to receive three-fourths of the profits, (if any,) and Goodwin one-fourth part thereof; that in the same proportion the losses (if any) were to be borne.

The answer sets up several matters of defense, by way of counterclaim; but as the issues are all noticed in the Referee's report, no further notice of them is required here. The whole case seems to resolve itself into questions of fact, upon which the Referee has already passed.

The defendants have taken only two exceptions.

I. The first exception appears to have been taken unnecessarily, as

1. The evidence sought for by the defendants was not admissible, but

2. It was received by the Referee as evidence for the defendants, and after it was so received, the defendants excepted.

II. The second exception is not well taken, because it was not hearsay evidence—it is merely a history of the note of \$500, marked exhibit J. The only material point was established by the testimony of the witness before he produced the note; and, moreover, no objection was made in time. After evidence is received without objection, the only means of getting it out of the case is by a motion to strike it out.

III. The conclusions of fact found by the Referee are sustained by the evidence; and the principles of law applied to those conclusions are elementary. Every doubt has most scrupulously enured to the benefit of the defendants.

IV. If the Court shall be of the opinion that any error has been committed by the Referee, and that such error can be corrected by deductions, we request that the proper deductions should be made, and the judgment affirmed as to the residue, instead of granting a new trial.

BY THE COURT—BOSWORTH, Ch. J. The Referee has found that Henry C. Goodwin, the plaintiff's assignor, and the defendants, were partners, under the name of Foot & Cole, from the 1st of October, 1855, to the 1st of April, 1856. The Referee has also found that the sum of \$1,415.79 was due, at the date of his report, from the defendants to the plaintiff, upon a just statement of the accounts between the partners. The defendants do not seek to disturb the decision that Goodwin and Foot and Cole were partners.

They complain that two counterclaims which they set up were rejected, and that they were not allowed certain credits; and to obtain a correction of the errors alleged in these respects, they have appealed from the judgment entered on the report of the Referee.

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As to the items of credit claimed by the appellants; and,

First. The item of \$249.94.

Of the items composing this aggregate, three, viz., \$61.22, \$63.80, and \$28, were allowed: the total is \$153.02, and one-quarter is \$38.25. Proof of these items was furnished beyond the fact that they were charged to profit and loss after the firm was dissolved. Of the remaining items composing such aggregate, no evidence, beyond that fact, was furnished. The making of such entries, after the firm was dissolved, is not, of itself, and without further proof, *prima facie* evidence that they are items of loss properly chargeable to the firm.

Second. The item of \$318.73, being one-quarter of balance due from Z. Reuwee, December 24, 1856. The balance then due was \$1,274.93. There is nothing in the evidence tending to show that this balance arose from, or is affected by, sales made between the 1st of October, 1855, and the 1st of April, 1856, unless the facts, that the balance due from Reuwee October 1, 1855, (when Goodwin became a partner,) was \$8,536.47, and the balance due when Goodwin left was \$1,274.93, tend to show it. This is not enough to demonstrate that the Referee erred.

Third. The item of \$139.59, being one-quarter of an account against the Catskill Mill for \$558.35.

This account commenced in June, 1855, and ended January 1, 1857. While Goodwin was in the concern, the firm sold to the amount of \$1,526.92, and received \$1,969.48. The amount of debits, or of credits, subsequent to the 1st of April, 1856, and prior to January 1, 1857, does not appear. Without the dates of the several items of debt and credit, subsequent to the 1st of October, 1855, we cannot see clearly that the Referee erred in rejecting this item.

Fourth. The item of \$91.23, one-quarter of balance of \$364.92, alleged to be due from John S. Dye. It appears that, on the 29th of December, 1855, Dye confessed a judgment for \$1,619, as security for what he then owed Foot & Cole. It does not appear that the \$364.92 was not included in it. And it does appear that, on the 10th of September, 1857, the defendants settled with Dye all demands to that date, in full, and gave a receipt to that effect. This is sufficient to justify the disallowance of this claim.

Fifth. The item of \$176.06, amount of Porter's note, forming part of the capital contributed by Goodwin.

It was proved that an execution, issued on a judgment recovered by Foot & Cole on this note, was returned satisfied. The presumption is that the judgment was recovered, and that the money collected on the execution was received by Foot & Cole. The claim to be allowed this item was properly rejected.

Sixth. The item, "Bills recd. Dye's notes, \$1,803.50."

The ground on which the Referee placed his rejection of this claim is tenable, and is alone sufficient to uphold his decision. If he believed the testimony of Goodwin as to the origin of the notes and the circumstances under which they were made, the claim might also have been rejected on other grounds.

The Referee has not found whether Goodwin induced Foot & Cole, by false and fraudulent representations, to take these notes. If he might have found that they made a sale to Goodwin, as purchaser and principal, and took these notes by reason of his fraudulent representations, it may be true that the mere fact that they canceled and surrendered the notes for a valuable consideration would not be a bar to this claim, although they were canceled for less than their face, if all was obtained for them that they were worth.

But, if we assume that, on such a state of facts, they might retain the notes and sue Goodwin for the damages sustained by the fraud, yet, as against his assignee of the balance due on an accounting between the partners, it is not obvious on what ground they could set up, as a counterclaim, a cause of action against Goodwin growing out of his fraudulent representations in a transaction disconnected from the partnership business. It is not a cause of action against the present plaintiff. That objection is insuperable, and makes it impossible for the defendants to recover on that counterclaim—assuming the fact to be correctly found, that they have canceled and surrendered the notes to Dye for a valuable consideration.

With that fact existing, however the other facts might properly be found, their only remedy (if any) is an action against Goodwin for the damages caused by his fraud; and that cannot be made a counterclaim against Boyd, the present plaintiff.

Seventh. "The debt against the Painsville Mill, \$885.04."

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The finding of the Referee, that this debt was a debt owing to the firm by the person running the mills, and not by Goodwin personally, is, in our opinion, warranted by the evidence. We are not justified in holding that it is contrary to the evidence. The Referee has charged Goodwin, and Boyd as his assignee, with one-fourth of this claim. This is conceded to be correct, provided it be assumed, or must be held, that Goodwin is not liable for the debt as principal.

These views dispose of all questions made by the appellants on the appeal, except those connected with two exceptions taken during the progress of the trial, and which two are the only exceptions taken during the trial to which our attention was directed on the argument, or which are noticed in the points of the appellants.

The exception taken to certain evidence of Goodwin, as being "hearsay," may be dismissed with the remark that the evidence objected to could not possibly have prejudiced the defendants. It related to the question whether a note dated October 8, 1855, for \$500, made by McGee and Mitchell, had been paid. This note had been contributed by and credited to Goodwin as capital.

The witness on behalf of the defendants testified that \$200 only of its amount had been paid; that it was compromised for forty cents on the dollar, the makers having failed. This was the fact, as the defendants sought to prove it. The Referee charged against Goodwin the \$800, by reason of the failure of McGee and Mitchell, and the acceptance of \$200 from them as a compromise of the \$500.

Hence, it is evident that the defendants had all the allowance made to them which, by any possibility, could have been made, if no testimony had been given by Goodwin in respect to this item.

The only remaining exception was taken to the decision, that testimony in relation to the purchase of the Pittstown Mill was impertinent "as the matter is not specified as a counterclaim in the pleadings."

The defendants were apparently attempting to prove that this purchase was a partnership transaction. If it was, it was a proper item to be established, and the defendants were entitled to be

allowed such sum as would be just with reference to its actual results.

The direct examination of Cole tended to show that the purchase was on account of the firm of Foot & Cole, while Goodwin was a member of it. His cross-examination had weakened somewhat the force of his evidence on the direct examination, when the Referee (apparently) arrested the examination and excluded the evidence in relation to this claim, on the ground that it was impertinent; and impertinent because the claim had not been set up in the pleadings as a counterclaim.

If the appellants were precluded, on this ground, from giving evidence to establish the fact that this mill was purchased for the firm with the assent of all of its members, the decision was erroneous.

In the view which we take of the decision made, the Referee interposed while Cole was under examination in respect to this item, and expressed the opinion and decided that all testimony on this point was impertinent, because the matter was not pleaded as a counterclaim. To this decision the defendants excepted.

It is indeed true that a full investigation of the matter may result in proof that the purchase was not made for and on account of the firm.

But that consideration does not meet the difficulty created by the Referee's decision. That decision precluded the defendants from proving (however satisfactory the evidence which they were prepared and desired to give in that behalf) that it was a co-partnership purchase, and that they were entitled to a deduction by reason of it. It precluded them from proving these facts on the ground that the matter was not pleaded as a counterclaim.

It is not a counterclaim, but is one of the several partnership transactions, if the supposed facts do in truth exist.

But we think it unnecessary to grant a new trial, if the plaintiff will consent to a deduction of the whole allowance claimed by reason of this matter.

The direct examination of Charles Cole on this point presents the precise claim which the defendants make in this behalf, and its nature and extent. His testimony is that "there are debts unpaid contracted when Goodwin was with us; we bought for \$1,500 a mill at Pittstown, N. Y., on which was a mortgage of

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\$3,000, on which we paid 10 per cent, the *balance*" (\$1,350) "is still due and the parties claim payment of us; we have been unable to sell this property, although we have made great efforts; it is now in the hands of a Receiver and I have been notified that it will be sold on our account."

This is the whole evidence given in relation to the nature and extent of the claim. It is the only statement respecting it found in the printed Case.

The appellants' printed points state that "Goodwin should have been charged with one-fourth of the loss on the Pittstown Mill. This mill was purchased while Goodwin was with Foot & Cole, and at his suggestion, for \$1,500, the whole of which has been lost." * * "The transaction entered into the accounts between the alleged partners, and the loss on it should be charged one-fourth to the plaintiff."

The claim, as here made, in the broadest construction which can be given to the language in which it is stated, is one-fourth of \$1,500 and interest from the time of the purchase. The purchase could not have been made earlier than the 1st of October, 1855, the day the partnership was formed. If, therefore, \$375 with interest from that date be deducted, the defendants will be allowed the utmost they can pretend to have claimed.

Allowing this will allow more than a fair construction of the language used may be thought to claim. The 10 per cent paid down, (*viz.* : \$150,) if the matter was deemed and treated as a partnership transaction at the time, would naturally be charged to the firm when it was paid. If that was done, they have been allowed already one-quarter of that in the accounts as kept by the partners.

So too, if the property shall sell for any sum over and above the mortgage upon it, the loss will be only the difference between that excess and \$1,500.

Hence if the plaintiff, rather than submit to the delay and expenses incident to a new trial, will stipulate to deduct from the balance found by the Referee \$375 and interest thereon from October 1, 1855, to the date of the report, the judgment as a judgment entered on a report for the true balance arising on such a correction, may be affirmed. In that event it will be

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affirmed without costs of the appeal to either party, as it will, in substance, be affirmed in part and reversed in part.

The decision in *Moffet v. Sackett*, (18 N. Y. R., 522,) in our view of it, does not prevent our making this disposition of the appeal; we do not undertake to decide, upon conflicting or uncertain evidence, how much was lost by this transaction, but allow to the defendants the whole amount of their claim in this behalf.¹

If the plaintiff does not choose to make such a deduction, tho judgment must be reversed and a new trial granted, with costs to abide the event.

Ordered accordingly.

ROBERT D. ANDERSON and FREDERICK E. HOUGHTON, Plaintiffs
and Respondents, v. ANASTASIUS NICHOLAS, Defendant and
Appellant.

1. One who has either tortiously or feloniously, without the knowledge or consent of the owner, obtained the possession of a certificate of stock having a power of attorney in blank annexed thereto, cannot confer title on a third person by selling and delivering the same for a valuable consideration, although the purchaser acts in good faith, believing he is dealing with one who owns or has due authority to sell the stock.
2. One who receives such a certificate and power, and sells the same or causes the same to be sold, by direction of one whom he supposes to be the owner or to have due authority, is liable to the actual owner for a conversion of the stock, notwithstanding he has paid over the proceeds to the person employing him.
3. One who deals with or disposes of the personal property of another (the same not being negotiable paper) must see to it that he acts by the authority of some one who has power sufficient to warrant such dealing or disposition.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 9th; decided, July 9th, 1859.

THIS is an appeal by the defendant from a judgment entered on the report of M. B. Maclay, Esq., as Referee.

¹ See *Monieau v. Snyder*, (31 N. Y. R., 179, 188,) affirming the like order of this Court.
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The action was brought to recover the value of twenty shares of stock of the American Guano Company, which had been wrongfully taken from the plaintiffs' possession by the son of one of the plaintiffs, and delivered, disposed of, or pretended to be sold to the defendant; a demand of the stock by the plaintiff, and refusal to deliver was alleged, and a conversion thereof by the defendant to his own use.

The defendant's answer put in issue all the allegations in the complaint.

The Referee found, *first*, "That the plaintiffs were possessed of and owned, as partners, twenty shares of the capital stock of the American Guano Company; and that on or about the 25th day of October, 1858, one Alexander H. Anderson, a son of the plaintiff, Robert D. Anderson, and a minor of the age of about sixteen years, without the leave, permission, authority or knowledge of plaintiffs, or either of them, wrongfully took said twenty shares of stock out of the possession of the plaintiffs.

"*Second*. That the said twenty shares so taken were in one certificate, and were in all respects, except as to the number of shares and the number of the certificate, like the following:

"No. 732.

One Share.

"AMERICAN GUANO COMPANY.

"This is to certify that A. G. Benson, President, of New York, is entitled to one share in the capital stock of the American Guano Company, standing in his name, and transferable on the books of said Company only upon surrender of this certificate by the said A. G. Benson, President, or his attorney.

"New York, 7th January, 1856.

"A. G. BENSON, *President*.

"JOS. L. WYCKOFF, *Treasurer*.

"(Indorsed.)

"Know all men by these presents, that.....
for value received, do hereby constitute and
 appoint.....to be.....true
 and lawful attorney for.....and in.....name
 and stead to sell, assign and transfer unto.....

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.....shares in the capital stock of the American Guano Company, standing in.....name on the books of said Company.

"In witness whereof.....have hereunto set.....hand and seal this.....day of.....one thousand eight hundred and.....

"A. G. BENSON *President.* [L. S.]

"Witness present, ARTHUR BENSON.

"*Third.* That the said stock was not sold and disposed of to the defendant; but that said Alexander, on or about the said 25th of October, 1858, offered to dispose of said twenty shares of stock to the defendant; that the defendant offered said Alexander \$3 per share for the same, which amount said Alexander at first refused to take, but almost immediately afterwards agreed to accept, and so stated to the defendant, and that, thereupon, defendant took said stock from said Alexander, went out to inquire about the same; and, upon returning to his office, finding several persons waiting in the back room to do business with him, he stated to his clerk, George M. Bowen, that it was all right, and that he might do as he pleased about buying it, and thereupon handed said certificate of twenty shares to his said clerk, and thereupon the said clerk closed the transaction with the said Alexander, by paying him \$3 per share, and retaining the said twenty shares of stock.

"*Fourth.* That at no time prior to the commencement of this suit was any intimation made to either of the plaintiffs that said clerk had ever had any interest in said stock; and that no part of said \$60, received by said Alexander, was received by or went to the benefit of said plaintiffs, or either of them.

"*Fifth.* That shortly thereafter the said Bowen delivered said stock to the defendant to sell for him.

"*Sixth.* That the defendant thereupon caused said stock to be sold in his own name, by H. T. Morgan & Co., brokers, at the stock board, on the next day after same was obtained as afore-said, of said Alexander, for \$7 per share; received the proceeds of the sale, and accounted to said Bowen for such proceeds, less his commission for such sale.

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"*Seventh.* That at the time of such sale by defendant, the said stock was of the value of \$10 per share, amounting in the aggregate to the sum of \$200.

"*Eighth.* That a day or two after such sale, and before the commencement of this suit, the plaintiffs demanded of defendant the return of said stock, or the value thereof, stating to defendant that the plaintiffs owned the stock, and that the said Alexander had taken it without the leave or knowledge of plaintiffs, or either of them, and offering, if defendant would pay the difference between the \$60 given for the stock and the \$140 received by defendant on its sale, to take that in full satisfaction. Defendant admitted, at this time, in the presence of his said clerk, that he, the defendant, had purchased the said shares of said Alexander, for \$8 a share, and had sold the same for \$7 a share, and received the avails thereof; but that the said defendant refused to return or deliver the same, or to pay the value thereof, or any part thereof.

"*Ninth.* That thereupon, as matter of law, I do find and report that the defendant wrongfully converted said stock to his, said defendant's, use, and that plaintiffs are entitled to judgment in their favor against the said defendant for the sum of \$200, being the value of said stock, with interest from the 10th day of November, 1858, to the date of this, my report, amounting to \$205.83, and costs.

"Dated, New York, April 11th, 1859."

Judgment for the plaintiffs was accordingly entered, and the defendant appealed.

The only exceptions taken on the trial were to the final decision.

F. H. Upton, for the defendant, (appellant.)

I. The conclusion of law is wholly unsupported by, and at variance with, the Referee's several findings of the issues of fact.

1. The Referee having found that the defendant did not purchase the stock in question, and that he did not sell the same as his own, but as the agent of another, with whom he accounted, and to whom he paid over the proceeds, before any demand upon, or notice to him, that the stock had been wrongfully taken from

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the plaintiffs, has found against the plaintiffs the very facts upon which alone they rest their claim for a recovery.

2. Having thus found these facts upon which alone the plaintiffs allege a wrongful conversion by the defendant, such conversion is completely and necessarily excluded by the findings.

3. A wrongful conversion, as matter of law, can only be predicated upon the findings of the issues of fact as made by the pleadings.

4. A wrongful conversion, as matter of law, cannot be predicated upon the admissions of the defendant at the time of the demand and refusal, if the issues of fact are from the other evidence found against such admissions. The Referee might have been justified in finding, as matter of fact, from those admissions, that the defendant was the principal in the transaction, and not the agent; but having found otherwise, a conclusion of law cannot be based upon the truth of admissions which he has found to be untrue.

In the cases where the admissions of the defendant have been held sufficient evidence of conversion, those admissions have stood alone, uncontroverted by other evidence, and a portion of the conceded facts of the cases. (*Laplace v. Auvoix*, 1 Johns. Ca., 406; *Everett v. Coffin*, 6 Wend., 603; *Dezell v. Odell*, 3 Hill, 215.)

II. If any wrongful conversion of the stock in question has been made by any one, the findings of fact by the Referee clearly point to Bowen, and not to the defendant, as the party who has made, and who in law is alone liable for such conversion.

The facts found are:

1. That the defendant did not purchase the stock from the plaintiff's son.

2. That in selling the stock he merely acted as Bowen's agent.

3. That he accounted with Bowen for its proceeds.

4. That he did this before any demand upon or notice to him of the plaintiff's claim.

Upon these facts, the action, if at all maintainable, can only be maintained against Bowen.

If, while the stock was in the hands of the defendant, as Bowen's agent, the plaintiffs had given him the notice, and made the demand, then his exercise of dominion, or his assertion of claim,

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whether as principal or agent, might have been sufficient to render him liable in trover. But all the authorities agree in this, that the claim, or interference or exercise of authority, as the basis of an alleged conversion, must be in opposition to the real owner at the time of the demand, and while the person so claiming has the property in his actual control or power. (*Connah v. Hale*, 23 Wend., 462; *Farrar v. Chauffete*, 5 Denio. 527; *Cobb v. Dows*, 9 Barb. S. C. R., 230; *Frye v. Lockwood*, 4 Cow., 454; *LaFarge v. Kneeland*, 7 Cow., 456; *Mowatt v. McClelan*, 1 Wend., 173.)

III. The complaint of the plaintiff does not state those facts, nor does the Referee find those facts which are, in law, essential to be averred and proved, in order to justify the conclusion of a conversion of the property in question, either by the defendant or by Bowen. Those essential facts, neither averred nor found, are these:

1. That the son of the plaintiff acquired his possession feloniously.

2. That the defendant obtained it from him in bad faith and with notice of the felony—or,

3. With notice or knowledge of facts or circumstances which ought to have put him, as a man of ordinary prudence, on his guard.

(a.) The fact averred and found, that the plaintiff's son, "without the permission or knowledge of the plaintiffs," wrongfully took the stock from their possession, is not an averment inconsistent with an averment of a simple breach of trust, or fraudulent conversion on the part of the young man. And it being in evidence that he was or had been in the employment of the plaintiffs; that he was entrusted with the key of the safe, where their securities were deposited; and that he took the certificate in question from the safe in mid-day—are facts which negative the idea of a felony, and tend to show a violation of the confidence reposed in him, by allowing him to have access to and the control of the plaintiffs' securities.

If the complaint not only does not aver, and the Referee does not find the possession of young Anderson to have been a felonious one; but, on the contrary, the facts tend to show that such possession was the result of the position which he occupied, and

the confidence had in him by the plaintiffs, then the authorities are uniform, that a purchaser for value, without actual notice, is protected against the claims of the rightful owner. (*Parker v. Patrick*, 5 D. & E., 175; *Mowrey v. Walsh*, 8 Cow., 238; *Saltus v. Everett*, 20 Wend., 275; *Lloyd v. Brewster*, 4 Paige, 540; *Andrew v. Dieterich*, 14 Wend., 31; *Hoffman v. Carow*, 22 id., 285.)

(b.) There is neither averment nor proof, nor any pretense of any bad faith on the part of the defendant, assuming him to have been the purchaser from the plaintiff's son.

(c.) Bad faith in the defendant not being averred, it was essential, to entitle the plaintiffs to a recovery, that the Referee should expressly find, as a matter of fact, that the defendant had notice or knowledge of facts or circumstances which ought to have put him, as a man of ordinary prudence, on his guard. This the Referee does not find, and there is therefore no basis for his legal conclusion. (*Pringle v. Phillips*, 5 Sand., 161, and cases cited.)

IV. This notice or knowledge on the part of the defendant, of such facts or circumstances as shall put a man of ordinary prudence on his guard, is essential, as the basis of his liability, because the character of the property alleged to have been converted was such as to bring it clearly within the exceptions to the rule—that he who has himself no title to a personal chattel can pass no title to another.

1. The exceptions to this rule, as important as the rule itself, are established in favor of trade and commerce, and apply to all instruments and securities which are negotiable, and pass from hand to hand by mere delivery. (*Miller v. Race*, 1 Burr., 452; *Grant v. Vaughan*, 3 id., 1516; *Gill v. Cubit*, 3 B. & C., 466; *Snow v. Peacock*, 3 Bing., 406; *Baynes v. Foster*, 4 Tyrw., 65; *Beckwith v. Corral*, 3 Bing., 444; *Snow v. Saddler*, 3 id., 610; *Strange v. Wigney*, 6 id., 677; *Easley v. Crockford*, 10 id., 248.)

All these cases (cited with approbation in *Pringle v. Phillips*, before cited,) establish the doctrine, that the actual good faith of the purchaser or bailee for value of such a character of property, is not questioned, there must be proof in order to deprive him of his protection in the purchase, of a want of reasonable caution or prudence on his part in omitting to make any inquiry when just grounds of suspicion exist, of which he has knowledge.

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2. Property of the character of that claimed to have been converted in this case has been included within the exception to the rule, ever since the great leading case of *Lickbarrow v. Mason*, (2 T. R., 68,) in which it was decided that the consignor, who had indorsed in blank the bill of lading, lost his right to stop the goods *in transitu*, when the consignee holding it had fraudulently delivered it to a third party, who had advanced his money upon it in good faith.

3. The doctrine has been expressly applied to certificates of stock, in *The Commercial Bank v. Kortright*, (22 Wend., 348;) *Sargent v. Franklin Insurance Company*, (8 Pick., 90,) and in this Court, in the case of *Fatman v. Lobach*. (1 Duer, 354.)

In this last case it was expressly held that a certificate of stock, with a power of attorney executed thereon, in blank, (exactly as was the case here,) was a negotiable instrument, the property in which passed by delivery and protected the purchaser or him who advanced his money upon it.

6. But inquiry was made, and that, too, as the testimony shows, from the best sources within reach, for the purpose of ascertaining if the young man might safely be dealt with.

V. The facts found by the Referee are wholly insufficient to sustain his conclusion of law, that the property in question was wrongfully converted by the defendant; and neither the facts averred, proved nor found by the Referee, are sufficient in law to sustain a claim on behalf of the plaintiffs for an unlawful conversion of the property against any one other than the son of the plaintiff.

Charles W. Prentiss, for the plaintiffs, (respondents.)

I. Any exercise of dominion over property, in opposition to the rights of the owner, is a conversion, and even a mere claiming may be. (*Connah v. Hale*, 23 Wend., 462; *Farrur v. Chaufetete*, 5 Denio, 527; *Cobb v. Dows*, 9 Barb. S. C. R., 230; 2 Greenl. Ev., § 642; *Harris v. Saunders*, 2 Strob. Eq. R., 370; *Parker v. Goddard*, 39 Maine R., 144; *Freeman v. Scurlock*, 27 Ala. R., 407.)

II. Stock is not negotiable like bills or promissory notes. (*Covill v. Hill*, 4 Denio, 323, aff'd, 2 Seld., 374; *Brower v. Peabody*, 11 How. Pr. R., 492; *Mechanics' Bank v. N. Y. & N. H.*

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R. R. Co., 3 Kern., 599; *Biddle v. Bayard*, 18 Penn. S. R., 150; *McCready v. Rumsey*, 6 Duer, 574.)

III. Therefore, the stock having been stolen, the defendant, whether he acted as principal or agent, acquired no better title to the stock than the boy had; and having sold it, is liable to the owners. (*Williams v. Merle*, 11 Wend., 80; *Andrew v. Dietrich*, 14 Wend., 31; *Hoffman v. Carow*, 20 Wend., 21, aff'd, 22 Wend., 285; *Covill v. Hill*, 4 Denio, 323, aff'd, 2 Seld., 374.)

IV. The Referee's report shows that the defendant admitted to the plaintiffs, before this action was commenced, that he had bought and sold the stock. This is of itself sufficient evidence of conversion. (*La Place v. Aupoix*, 1 Johns. Cas., 406; *Everett v. Coffin*, 6 Wend., 603; *Dezell v. Odell*, 3 Hill, 215.)

V. Even admitting that the defendant in this transaction acted only as the agent or broker of Bowen, he is still liable for the conversion; and equitably so, as he knew all the circumstances of the pretended sale, and received part of the proceeds of the stock. (*Bristol v. Burt*, 7 Johns. R., 254; *Thorp v. Burling*, 11 id., 235; *Murray v. Burling*, 10 id., 175; *Reynolds v. Shuler*, 5 Cow., 323; *Hoffman v. Carew*, 20 Wend., 21, aff'd, 22 id., 285; *Farrar v. Chauffetete*, 5 Denio, 527; *Pringle v. Phillips*, 5 Sandf. S. C. R., 157; *Calkins v. Allerton*, 3 Barb. S. C. R., 171; 2 Greenl. Ev., § 645; *Perminster v. Kelly*, 18 Ala. R., 716; *Dunlap's Parley's Agency*, 4th Am. ed., 399, and n. b.)

BY THE COURT—WOODRUFF, J. The defendant in this case is liable for the value of the stock. The lad, Anderson, had no title to the stock, and no authority to dispose of it. He had not been intrusted with the certificate by the plaintiffs, the true owners, but had taken it wrongfully without their consent. He could, therefore, by no act of his, confer title upon the defendant or upon Bowen; nor could he give to either of them a right to dispose of the stock.

Bowen having neither title to the stock nor authority to sell it, (assuming, for the purposes of the question, that the defendant had nothing to do with the purchase from the boy, and is in that respect in the same situation as if he had never seen the boy at all,) could not authorize the defendant to dispose of the stock, nor could he confer upon him any authority which the

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defendant can interpose as a protection against the plaintiffs' claim.

The defendant has in fact received the certificate of the plaintiffs' stock; he has employed third persons to sell it for him; it has been sold in obedience to his instructions; he received the proceeds of sale; and he is not protected by any legal authority to do the acts so performed. This makes him liable to the owners of the stock. He has dealt with their property without their consent, and received its proceeds on a sale made by his direction.

Assuming that he acted in good faith in the belief that the stock, when he caused it to be sold, belonged to Bowen, is not sufficient to protect him. One who deals with or disposes of the property of another, (the same not being negotiable paper,) must see to it that he acts by authority of one who has title, or who has an authority to confer, sufficient to warrant such dealing or disposition. (*Everett v. Coffin*, 6 Wend., 603; *Williams v. Merle*, 11 id., 80; *Saltus v. Everett*, 20 id., 267; *Hoffman v. Carow*, 20 id., 21; 22 id., 285; *Connah v. Hale*, 23 id., 462; *Covill v. Hill*, 4 Denio, 323; 2 Seld., 374; *Cobb v. Dows*, 9 Barb., 230.)

The judgment should be affirmed with costs.

Ordered accordingly.

DURBROW *et al.*, Plaintiffs and Respondents, v. McDONALD *et al.*, Defendants and Appellants.

1. Where a valid contract is made for the sale and delivery of the wheat in a specified boat for cash; and the buyer designates a vessel into which the wheat is to be delivered and the seller accordingly has it measured as is customary in such cases and placed on board of such vessel, and sends to the buyer a duplicate measurer's return or certificate of the quantity, and a bill for the wheat at the contract price, and the seller thereupon requests payment from the buyer, who answers that he will pay on Saturday, (the second day thereafter,) and the seller makes no objection thereto; and where there is no fraud in making such contract or obtaining such delivery, a person in good faith advancing money on the same day to such buyer on the security of such wheat and on the faith of his being the owner thereof, will obtain a valid title thereto as against the seller to the extent

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of such advance; although such buyer fails after obtaining such advance and thus becomes unable to pay to the seller any part of the contract price.

2. Such a delivery being all the delivery which the parties contemplated or the contract required; it was subject to no condition unless it be an implied one, that payment be made if demanded, when all the wheat was delivered.

3. Where, in such a case, an advance is made to such buyer upon the understanding at the time of both parties to it, that it is made on the security of such wheat; and that the person advancing should thenceforth have the control of it and that a bill of lading should be issued to him as the shipper of it, making the wheat deliverable to his order at the port of destination, and such bill of lading is immediately thereafter so issued and delivered; the person so advancing from the time thereof has the right of possession and of control, as against the seller.

4. Evidence of other contemporaneous purchases by such buyer and of his failure to pay therefor on the day he agreed to pay, there being no evidence that they were fraudulent or that any representations were made in negotiating the contract for the wheat in question, is inadmissible.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 15th; decided, July 9th, 1859.

THIS is an appeal by John Child, Francis McDonald, Peter McLeod, Hodgson Bigland and John Athya, (the defendants, who, exclusive of John Child, compose three several firms, viz.: the firm of Francis McDonald & Co., of N. Y.; Bigland, Athya & Co., of Liverpool; and John Athya & Co., of Glasgow;) from a judgment in favor of John B. Durbrow, John C. Winne and William R. Sheldon, (the plaintiffs, who compose the firm of Durbrow, Winne & Sheldon,) entered on a verdict rendered on a trial had before Mr. Justice PIERREPONT and a jury on the 19th of November, 1858; and from an order denying a motion made by the defendants for a new trial.

The action was commenced about the 25th of October, 1856, to recover the possession of 3,499½ bushels of wheat, then on board of the ship *Compromise*, then in the port of New York, and of which the defendant, John Child, was master.

The complaint states, that on or about the 22d of October, 1856, the plaintiffs placed this wheat on board of the *Compromise* then bound for Glasgow; that it was their property; that on the 24th of October Francis McDonald & Co. wrongfully asserted a right of property in the wheat and notified Child thereof, who assented to the same, acknowledged them as the shippers and agreed to carry it for them to Glasgow; a

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demand of the wheat of the defendants; their refusal to deliver and wrongful detention of it; and prays judgment for a recovery of the property and damages for the detention.

The defendants by their answer deny these allegations, except the demand of and refusal to deliver the wheat; and as a separate defense aver that Theodore Perry was, on the 23d of October, 1856, the owner of the wheat, that it was then on board of the *Compromise*, which was then in the port of New York bound for Glasgow; that Child was then master of said vessel, and that Francis McDonald & Co., being factors and commission merchants, on that day, at the request of Theodore Perry, advanced to him \$5,000 on the wheat, on an agreement to sell the same at Glasgow and account for the proceeds; that Perry then duly transferred the wheat to them and ordered Child to hold it for them, and that Child, in pursuance of such order, on the 24th, issued and delivered to them a bill of lading by which the wheat was made deliverable at Glasgow to their order or assigns; whereby they became lawful owners of the wheat and entitled to the possession thereof.

A. F. De Luze, a broker, testified that on the 21st of October, 1856, he made a contract in writing between the plaintiffs and Theodore Perry, (which was produced and reads thus,) viz.:

"NEW YORK, October 21st, 1856.

"Sold to Messrs. Theo. Perry & Co., per J. W. Spencer, broker, account Messrs. Durbrow, Winne & Sheldon, 3,921 bushels western red wheat, per bt. D. Hibbard, 8,500 ditto, per bt. Ural, at \$1.54 per 60 lbs., delivered to vessel in good shipping condition. Quality, as per sample. Payment, cash.

"ALFRED F. DE LUZE, Broker."

That he made the sale through a broker, J. W. Spencer, who acted on behalf of Perry; that Spencer told him the wheat was to be sent on board the *Compromise*, at Pier 14, East River, and he requested the plaintiffs to send it there; that he sent the bought note to the plaintiffs and the sold note to Perry.

William R. Sheldon, one of the plaintiffs, testified that he recollected the request to send the barges containing the wheat alongside the *Compromise*; that a measurer was employed as

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usual to measure the wheat; he measured the wheat from the Ural and made duplicate returns, one for vendor and one for vendee; and on the morning of the 23d, witness sent the duplicate, and a bill for it, to Perry. The measurer's return, omitting unimportant particulars, reads thus, viz.:

"OLD BOARD OF MEASURERS' OFFICE,
21 Coenties Slip.
PAUL GROUT, *President*.
Jesse Marvin, | Edward G. Burgess,
James M. Hedges, | William Beach,
Benj. L. Guion, | T. J. Grout,
John Wright.

"NEW YORK, Oct. 22, 1856.

"Returns of thirty-five hundred and thirty-four bushels of Red Wheat, delivered from bt. Ural to ship *Compromise*, after *Bis*. Order of Theo. Perry, acc. of Durbrow, Winne & Sheldon.

"Half measuring, \$8 84
"Screening, 2 20
\$11 04

"3,534 bushels measure.

"3,499 80 12 weight.

"C. H. DOUGHERTY.

"Ex. R. C. M."

The bill for the wheat (sent with the measurer's returns) reads thus, viz.:

"NEW YORK, October 21st, 1856.

"Messrs. THEO. PERRY,

"Bought of DURBROW, WINNE & SHELDON,

"51 New street.

"Terms cash.

"3,499 80 12 bush. Red Wheat, as per returns, at
\$1.54 per bush., \$5,389 25
"One-half measuring and screening, 11 04
"\$5,400 29

"Ex. R. C. M."

He further testified thus: "On the 23d of October I met Perry on the Corn Exchange, and requested a check for the amount of

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this bill; Perry said he would pay on Saturday; * * the return for the other boat-load * * I got * * on Friday, October 24, and sent it that morning, with a bill of parcels attached, with a note from one of our firm requesting a check; he retained the bill, and sent back the measurer's return for the wheat with a message that he would like to see one of our firm; * * I went to see him; Perry said he had stopped payment the day before, and was not able to return the measurer's return for the previous boat-load; * * I then went to see the broker, and, in company with him, went to Perry and demanded the wheat and documents of him; he refused them; we then went to the owner of the ship, to demand the wheat of him; we found that the bill of lading for the wheat had just then been delivered, and then went to the defendants' office and demanded the wheat of them; they said they had advanced to Perry, and the wheat was their own." He was asked this question:

Q. "In October, 1856, in case of sales of wheat in bulk like this from a canal boat or barge to a vessel, what was your practice, and what was the course of trade after the property had been sold?

A. "The measurer sends the seller his return in duplicate; the one is called a whole return, the other a half return; the only difference between them is, that in the half return, which is intended for the purchaser, one-half of the amount of the measurer's fee is stated, the seller paying the whole in the first instance to the measurer; I send the half return, with a bill of parcels, to the purchaser; then send for the money; do nothing more."

It was admitted that Perry's notes were protested on the 23d of October; and the plaintiffs, against the objection and exception of the defendants, were permitted to give evidence that Perry purchased grain of other houses in October, 1856, viz., on the 12th, 17th and 22d of October, to large amounts, for which he failed to pay on the 28d; that up to that day his credit was good.

James Hutchinson, a confidential clerk of the defendants, testified that, on the 17th of October, Perry told them "he was going to ship about 7,000 bushels by the *Compromise*;" that, on the morning of the 23d, before 12 o'clock, Perry applied for \$5,000; "at that time I refused to give it to him; he told me he

wanted it on account of the Compromise; that there was one boat-load of wheat on board; I then gave it to him;" * * "I obtained from Perry the measurer's return of the wheat on the morning of the 24th of October; that was the first time I had ever seen it;" that he got the bill of lading for the wheat that morning; the bill of lading was dated the 22d of October; it stated Francis McDonald & Co. to be the shippers, and the wheat to be deliverable at the port of Glasgow unto the shippers' order or assigns; and it was read in evidence.

Evidence was given tending to show that, in October, 1856, it was the usage in New York, in regard to wheat shipped in bulk, to sign and deliver bills of lading upon production of the measurer's return.

The Case states that

"The defendants' counsel offered to prove that by usage in the city of New York, measurer's returns of grain in bulk like that in evidence in this cause, were considered equivalent to ship's receipts, entitling the bearer to bills of lading for the property.

(The plaintiffs' counsel objected to the evidence as incompetent, and the evidence hereinafter contained on that subject was received subject to the objection and without prejudice to the plaintiffs' objection as to its legal effect.")

Evidence, of the character so offered, was then given.

The charge of the Judge, although it did not in terms direct a verdict for the plaintiffs was, in substance, that they were entitled to recover, and the defendants excepted to it, as "being in effect a direction to the jury to bring in a verdict for the plaintiffs."

He charged (*inter alia*) that "there is not, it seems to me, sufficient evidence that the purchase of the wheat by Perry was fraudulent."

The defendants made various requests of the Judge to charge, with which he refused to comply, and the defendants excepted.

The jury found for the plaintiffs, and the value of the wheat to be \$6,183.63, and the damages for detention to be six cents.

The defendants moved, on a case and exceptions, for a new trial, which motion was denied. From the order denying it and from the judgment entered on the verdict, they appealed to the General Term.

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Henry Nicoll, for appellants.

I. Upon the sale of the wheat in question an actual delivery was not in the contemplation of either party: the wheat was purchased for the express purpose of being shipped to Europe, and this purpose was communicated to the sellers at the time of the making of the contract of sale; hence there could be none other than a symbolical or constructive delivery of the property.

II. The plaintiffs, by the delivery of the wheat on board of the *Compromise* and by the delivery of the measurer's return and bill of parcels to the buyer Perry, had fully performed their duty as sellers. Nothing further remained to be done on their part or could be done by them to vest him with the title of the property. There was, therefore, a valid delivery and the title must have thereby necessarily become vested in Perry. (*Smith v. Lynes*, 1 Seld., 41; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, id., 373; *McCready v. Wright*, 5 id., 571; *Wilmshurst v. Bowker*, 7 Man. & Grang., 882; *Tansley v. Turner*, 2 Bing. N. C., 151; *Key v. Cotesworth*, 14 Law & Eq., 485.)

III. The testimony in the case establishes, that upon sales of grain similar to the one in question, there was, by the usages of the trade, a valid delivery of the wheat to Perry, and the evidence of such usage was entirely competent and proper. (*Keyser v. Suse*, 1 N. Gow., 58; *McCready v. Wright*, 5 Duer, 571; *Haggerty v. Palmer*, 6 Johns. Ch., 437; *Gibson v. Stevens*, 8 How. U. S., 384.)

IV. The wheat having been delivered and the title of Perry to the same thereby vested in him by the voluntary acts of the plaintiffs, the latter are precluded from reclaiming the property in the absence of any fraudulent intent on the part of Perry in making the purchase, and that no such fraudulent intent existed was conceded by the presiding Judge in his charge to the jury. (See cases cited to Point II.)

V. Perry, at the time of procuring the advance upon this wheat from the defendants, on the 28d day of October, 1856, was in the possession of the same as owner. The defendants advanced their money upon the wheat on the faith of such ownership, and are therefore entitled to the protection due to *bona fide* purchasers, and this would be so even though it should be admitted that as

between Perry and the plaintiffs, the latter, upon the insolvency of the former, would have been entitled to reclaim the property had the same remained in his possession.

VI. Although no muniment of title passed from Perry to the defendants directly upon the making of the advance, yet it is apparent that the defendants parted with their money relying upon Perry's promise to put them in possession of the property in the manner in which he had been accustomed to do in previous similar transactions; this promise might have been enforced by the defendants. In performance of this obligation, the defendants were, on the morning after making the advance, invested with the title to the property; this was done before any attempt was made on the part of the plaintiffs to reclaim the same. (*Fenby v. Pritchard*, 2 Sand. S. C., 151; *Beavers v. Lane*, 6 Duer, 232.)

VII. The evidence fully establishes the usage by which the bill of lading of the wheat in question was properly delivered by the master of the vessel to the defendants as the lawful holders of the measurer's return, delivered to them by Perry, in pursuance of his agreement, and for the express purpose of enabling the defendants to procure the bill of lading.

VIII. The evidence relating to sales of wheat made to Perry in the month of October, 1856, was improperly admitted. No foundation was laid for such evidence, there being no proof that the sales in question were made upon any representations, or upon any fraudulent intent whatever. (*Hall v. Naylor*, 6 Duer, 71.)

IX. The evidence offered by the defendants to show the practice between their house and Perry as to getting measurer's returns for wheat shipped in bulk, should have been admitted. The dealings between the parties in similar transactions were shown to have been large, and a practice had grown up in regard to getting these measurer's returns from Perry, which would have applied to the particular case, without any express reference being made to it in the transaction. The order denying the motion for a new trial should be reversed.

Jeremiah Larocque, for respondents.

I. The contract for the two boat-loads of wheat was one entire contract. The plaintiffs had no right to demand payment until
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both boat-loads were on board the Compromise, and on handing to the purchaser the measurer's return for the last boat-load. This was done on the 24th October, and the cash demanded, and on its non-payment this action brought on the same day. There was, therefore, in judgment of law, no delivery of the wheat, waiving the condition of cash payment. (*Russell v. Minor*, 22 Wend., 659; *Smith v. Lynes*, 1 Seld., 41; *Van Neste v. Conover*, 20 Barb. S. C. R., 554; *Ives v. Humphreys*, 1 E. D. Smith, 199; *Nichols v. The People*, 17 N. Y., 114.)

II. The plaintiffs did not part with their title to the wheat by placing it on board the Compromise, or by sending the measurer's return to Theodore Perry & Co. The measurer's return has none of the attributes of a shipping receipt, and the usage attempted to be proved by the defendants' witnesses, to deliver the bill of lading to the party presenting the measurer's return, without further inquiry, would be invalid, if established, for unreasonableness.

1. It does not in any sense purport to be a muniment of title, but a mere return of quantity made by an officer employed for that special purpose, and not connected with the ship in any way whatever, or with the seller.

2. On its face, in this instance, it shows the work to have been done on account of Durbrow, Winne & Sheldon, the plaintiffs.

3. It thus conveyed notice to whomever it was presented to, that the property was theirs.

4. It had not their indorsement or signature in any form, to indicate a transfer of their title.

5. If such a rule could prevail, it would open the door to intolerable fraud and abuse. (*Brower v. Peabody*, 3 Kern., 121.)

III. But if such a usage was established, it would not afford the slightest aid to the defendants here. Their advance to Perry was not accompanied by the delivery to them of any measurer's return or other document whatever. No bill of lading was signed until the next day, the very day of the replevin. The only information they had was that there was "one boat-load on board the Compromise." Whether it was wheat or what it was, they were not even informed. Nor had they the slightest information of the quantity. Boat-loads vary from 2,000 to 10,000 bushels. The \$5,000 was loaned Perry before noon on the 23d,

the very morning that that measurer's return was sent by the plaintiffs to Perry & Co.

IV. If the above positions are correct, the charge of the learned Judge to the jury was unexceptionable, on all the points as to which it was excepted to by the appellants.

V. For the same reasons, the appellants had no right to have any of the instructions given to the jury, which were contained in their several requests to charge.

The judgment below was therefore correct, and should be affirmed, with costs.

BY THE COURT—BOSWORTH, Ch. J. There are some facts established by testimony in no way conflicting. On the 21st of October, 1856, the plaintiffs and Theo. Perry & Co. entered into a valid contract, by which the former agreed to sell and the latter to purchase 3,921 bushels of wheat per boat D. Hibbard, and 3,500 per boat Ural, at \$1.54 per 60 pounds, to be "delivered to vessel in good shipping condition," to be paid for in cash on delivery.

The vessel Compromise was designated as the one into which delivery of the wheat was to be made. On the 22d, the wheat was measured from the Ural into the Compromise, and on the morning of the 23d the measurer's return, with a bill of the wheat dated the 21st, stating the quantity sold, "as per returns," to be 3,499 bushels, 30 pounds and 12 ounces weight, and the price at \$1.54 per bushel, to be \$5,389.25, and the charges for one-half measuring and screening to be \$11.04, was sent to the purchasers.

Subsequently, and on the same day, one of the plaintiffs (Wm. R. Sheldon) met Perry on the Corn Exchange, and requested a check for the amount of this bill. Perry said he would pay on Saturday. The 23d was Thursday.

Sheldon does not state that he made any objection to this, or suggested that it would not be satisfactory.

On these few uncontroverted facts, it cannot be doubted, as we think, that Theo. Perry & Co. then had all the actual possession it was ever contemplated they would have, nor that they then had the full possession, and in the precise manner, that the contract between them and the plaintiffs contemplated that full

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performance by the plaintiffs would give. There was a perfect delivery of the wheat which had been measured into the Comromise in pursuance of the contract between the parties, in such sense, that its subsequent loss by perils of the seas, or other casualty, would have been the loss of Theo. Perry & Co. Notwithstanding a subsequent loss of it, without the fault of either party, a tender of the balance would have enabled the plaintiffs, as a matter of right, to recover of Theo. Perry & Co. the contract price of the whole.

The most the plaintiffs can claim is, that although there was such a delivery made as satisfied the contract and fully performed it on their part, yet the delivery was conditional in such sense, that, if on delivering the balance, Theo. Perry & Co. refused or became unable to pay for the whole, the plaintiffs, as between themselves and Theo. Perry & Co., could have repossessed themselves of the wheat.

If this be so, the next important question is, did the transactions between Perry and Francis McDonald & Co. confer upon the latter a lien or title superior to the title of the plaintiffs.

We think it must be conceded that the purchase and possession by Perry were such as to enable him to confer upon a *bona fide* purchaser or pledgee for value, a title valid as against the plaintiffs. (*Smith v. Lynes*, 1 Seld., 41.)

The Judge instructed the jury that there was "not sufficient evidence that the purchase of the wheat by Perry was fraudulent." It is the right of the defendants to have that instruction treated, for all the purposes of the present appeal, as correct.

The advance of the \$5,000 made to Perry by Francis McDonald & Co., was made on the 23d, before 12 o'clock. It is not an unreasonable inference, from the testimony, that this advance was sought and made after the measurer's return and the bill annexed to it had been delivered by the plaintiffs to Theodore Perry & Co.

Nor is it an unreasonable inference that this advance was sought and made on the understanding, (at the time it was made,) between Theodore Perry & Co. and Francis McDonald & Co., that it was made on the security of the wheat in question; and that the wheat was at the time of the advance pledged as security for the repayment of the money, so far as that result could be

effected, by a clear understanding that Francis McDonald & Co. should have the control of it thenceforth, and a delivery to them of the measurer's return, and a bill of lading issued by the master stating Francis McDonald & Co. to be the shippers of the wheat, and that it was to be delivered at Glasgow to their order, to the end that it might be sold by their house there to reimburse them for this and other advances, and by the execution of that understanding on the following morning, by the actual delivery of the measurer's return and the contemplated bill of lading.

If Perry had paid the plaintiffs on the morning of the 28d for this wheat in full, at the time he was requested so to do, at the Corn Exchange, nothing more could have been done according to the usual course of business, so far as the evidence discloses what that was, than was done, to vest in Francis McDonald & Co. the legal title to the wheat, or to confer upon them the actual and legal control over it.

If the transaction was understood at the time of the advance, and was then intended to be such as is above suggested, then Francis McDonald & Co.'s right of possession and to control the wheat was perfect, as between them and Perry, had he been the absolute owner.

A transaction which would, had he been the absolute owner, have divested him of all right of possession and to control it, must have the same effect as against the plaintiffs, if the advance was made *bona fide* and in the actual belief that Perry was the owner, followed as it was, almost contemporaneously, with the execution and delivery of all the muniments and evidences of title that were adapted to the subject matter of the contract, situated as the wheat in question was, at the time the advance was made.

The charge of the Judge submitted no question of fact to the jury and was, in substance, an instruction to find for the plaintiffs, and was excepted to by the defendants on that ground.

We think there was sufficient evidence to justify the submission of the question whether the advance was made in good faith and upon the security of the wheat in question, and upon the understanding at the time that it should be thenceforward subject to the control and direction of Francis McDonald & Co., and that

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a bill of lading should be procured and delivered to them as the shippers, which by its terms should make the wheat deliverable at Glasgow to their order.

And they were entitled to the instruction, that if the jury found the affirmative of that proposition, the defendants were entitled to a verdict.

Evidence was admitted "subject to the objection" of the plaintiffs, "and without prejudice to the plaintiffs' objection as to its legal effect," that it was the usage in the city of New York, in October, 1856, to issue bills of lading to the person producing the measurer's return of grain shipped in bulk.

With what view it was admitted, the case does not clearly disclose. It is quite clear that no evidence was given which could have the effect to make the measurer's return operate to transfer the legal title to the wheat, to every holder of it by reason and force of his mere possession of it.

The only plausible ground, if any, for admitting evidence of the practice, is its bearing upon the question of the good faith of Francis McDonald & Co., so far as any light could be thrown upon that question, by proving that their transactions were according to the ordinary and usual course of business. But the case presented no such question, and the evidence seems to be irrelevant. As, however, the plaintiff obtained a verdict, this question does not properly arise on the defendants' appeal.

Evidence of other purchases made by Perry in October, 1856, was admitted against the objection and exception of the defendants. The evidence must have been offered and received as competent evidence, upon the question whether the wheat in question was purchased with a preconceived intent not to pay for it.

Neither the evidence of Van Syckel, Averill, or Whittlesey, tended to prove any fraudulent intent in making the purchases of which they testified, or making the purchase of the wheat in question. (*Hall v. Naylor*, 6 Duer, 71; *S. C.*, in the Court of Appeals, 18 N. Y. R., 588.)

The judgment and order appealed from, must be reversed and a new trial granted, with costs to abide the event.

Ordered accordingly.

JOHN F. BUTTERWORTH, Receiver, &c., Plaintiff and Respondent,
v. JOHN KENNEDY, Defendant and Appellant.

1. Where a moneyed corporation discounts the note of a third person on the security of shares of its own capital stock, owned by him and pledged therefor, and such note is not paid at maturity, and the directors of such corporation do not sell such stock, neither their omission to sell it, nor their omission to charge such shares at the amount actually paid thereon as a reduction of the capital stock of the Company, affects the liability of such third person to the Company.
2. Such facts do not, by force of 1 R. S., 590, § 6, either extinguish the stock or the liability of the pledgor for the amount of his note secured thereby.
3. The effect of the charge which that section requires to be made is, that no dividends shall thereafter be made, "until the deficit so created be made good from the subsequently accruing profits of the Company."

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 17; decided, July 9, 1859.

THIS is an appeal by the defendant from a judgment entered against him on the verdict of a jury. The action was tried before Mr. Justice WOODRUFF and a jury, in March, 1859.

The plaintiff was duly appointed a Receiver of the property and effects of the Island City Bank, on the 25th of September, 1857, (it being then an insolvent moneyed corporation.) The suit is brought on a note alleged to be parcel of the assets of said bank, of which note the following is a copy:

"\$400. NEW YORK, Aug't 24th, 1856.

"Six months after date, I promise to pay to Wm. Stebbins, Cash'r, or order, four hundred dollars, for value received, having deposited with him as collateral security, with authority to sell the same at the Brokers' Board, or at public or private sale or otherwise, at his option, on the non-performance of this promise, and without notice. Payable at Island City Bank.

"JOHN KENNEDY.

"Twenty shares of the }
Island City Bank. }

"Feb. 27."

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The answer, so far as it is material, is as follows:

"And this defendant, for a further and distinct defense to the alleged cause of action set forth in said complaint, saith, that on or about the 3d day of October, 1853, he subscribed for twenty shares of the capital stock of said Island City Bank, and paid five hundred dollars, the par value of the same, therefor; that afterwards, and on or about the 8th day of May, 1854, the said Island City Bank discounted for this defendant his certain promissory note for the sum of four hundred dollars, payable at a time subsequent thereto, and as security for the payment of said sum of four hundred dollars this defendant assigned to the President of said Island City Bank, (for the benefit of said Bank,) said twenty shares of said capital stock, with a power to sell the same in case of non-payment of said sum of four hundred dollars, according to the terms of said note; that said stock so assigned was entered and transferred on the books of said bank on the twenty-seventh day of December, 1854, and was never afterwards re-assigned to this defendant. That said note was not paid at maturity, but was renewed from time to time, until the said note mentioned in said complaint was given, (which was a renewal of a note given in said succession of renewals for said original amount of four hundred dollars,) and that when said note became due this defendant abandoned said stock to the said Island City Bank in satisfaction of said amount payable by said last mentioned note; and said Island City Bank possessed itself of said stock and converted the same to its use.

"Wherefore this defendant prays that said complaint may be dismissed, with costs."

A reply was interposed, denying all the material allegations contained in the answer.

At the trial, the note was produced and read in evidence. The due appointment of the plaintiff as Receiver was admitted, and the plaintiff then rested.

The defendant then produced a paper writing, dated May 8, 1854, signed by himself, by the terms of which he assigned twenty shares of the stock of the Island City Bank, standing in his name on the books of said Bank, to "James O'Brien, President," and by the terms of which he appointed "William Stebins" his attorney to sell and transfer the stock.

He also proved that a transfer was made on the stock transfer book of the Island City Bank, on the 27th of December, 1854, of the said twenty shares of stock, to "James O'Brien, President," by "John Kennedy, per William Stebbins, attorney," by virtue of said power of attorney.

It was admitted that the said twenty shares are the same shares mentioned in the note in suit.

The defendant, as a witness in his own behalf, then testified, that on the 3d of October, 1853, he subscribed for twenty shares of the stock of this Bank, at \$25 per share, and paid \$500 therefor.

That on the 8th of May, 1854, his note of that date for \$400 was discounted by that Bank, on his pledging (by the assignment and power of attorney of that date above mentioned) the twenty shares of stock as security for its payment, with power to sell it if the note was not paid at maturity. The note was not paid, but was renewed from time to time, and the note in suit is the last of the renewals. That he never received but one dividend on the stock, and never got the stock back.

As evidence of the value of the stock, he proved that in 1855 and 1857, and as late as February, 1857, stock of the Island City Bank was sold at \$75 and \$80 on the \$100, and rested.

James O'Brien, for the plaintiff, testified that he was President of the Bank from the time it was organized until after the note was given; that the stock was transferred on the books of the Bank, to be held as security only; that it had never been sold or disposed of by the Bank, but was still held as security; and that if the defendant had paid his note, the stock would have been reissued to him at any time.

It was admitted that the shares so transferred on the books of the Bank to the name of the President, had never been reissued to the defendant or sold by the Bank, but stood in the name of the President as security for the Bank until its failure.

The parties having rested the case upon this evidence, the defendant moved to dismiss the complaint, on grounds substantially covered by the points made by him on the present appeal. The Judge directed a verdict in favor of the plaintiff, for \$457.47, to which direction the defendant excepted. From the judgment entered on the verdict, the defendant appealed to the General Term.

Butterworth, Receiver, &c., v. Kennedy.

Francis Byrne, for appellant.

I. The Bank had power to receive shares of its stock in payment or satisfaction of any debt due to it. (1 R. S., p. 590, old paging, § 1, subd. 6.)

And the shares having been transferred on the books of the Bank, the stock as stock became extinguished, and the money paid by the defendant therefor should, from the date of transfer, be considered as having been separated from the capital paid in, and as actually held by the Bank. (*Dykens v. Allen*, 7 Hill, 497; *Wilson v. Little*, 2 Comst., 443.)

II. The debt so secured not having been paid when due, and for sixty days thereafter, and the Bank having converted the stock, the debt, (because of such conversion, and of the debt being less than the amount paid on such stock,) became extinguished, and the note not available to the Bank or the plaintiff. (1 R. S., 591, § 6; *Peake's N. P.*, 30.)

The duty imposed by the statute to sell, and the omission so to do, and conversion of the stock by the Bank to its use, and the defendant's adoption of (by not dissenting from) their acts, sufficiently make an agreement to accept the stock in satisfaction. The stock represented \$500 in the possession of the Bank. The transfer of the stock amounted to an appropriation of the money to its own use. The conversion of the stock was equivalent to a conversion of the money. (*Zachrisson v. Ahman*, 2 Sandf. S. C. R., 68.)

III. His honor, the Justice, should have dismissed the complaint on the grounds specified by the defendant's counsel, and the judgment should be reversed and a new trial granted, with costs, &c.

C. A. Peabody, for respondent.

BY THE COURT—BOSWORTH, Ch. J. The note in suit was discounted by the Island City Bank, for the defendant, on the security of a pledge of twenty shares of its own capital stock.

The note has not been paid, and the pledgee, or its legal representative, still holds the stock and owns the note.

There is no rule of law or equity which declares these facts to be a defense, either total or partial.

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The 6th section of 1 Revised Statutes, 591, did not make it the absolute duty of the directors of the Island City Bank to sell this stock, even though the note was not paid within sixty days after its maturity.

The charge that is to be made, to satisfy the last clause of that section, is a charge which is to preclude the making of any dividends thereafter by the Company, "until the deficit so created be made good from the subsequently accruing profits of the Company."

The stock is not thereby actually extinguished, nor the debt of its pledgor satisfied.

It does not affect the rights of the pledgor or pledgee, though the pledgee be a moneyed corporation, and the pledge be shares of its own capital stock.

The judgment must be affirmed.

Judgment affirmed.

LOWELL HOLBROOK, Plaintiff and Respondent, v. ZENAS D. BASSET, Jr., and others, Defendants and Appellants.

1. A Mutual Insurance Company took up a subscription, by which the subscribers agreed to give their notes for premiums in advance of insurance to be effected by them, the subscription not to be binding until the sum of \$300,000 was subscribed. That sum was in form subscribed, the defendants being subscribers, and the defendants voluntarily gave their notes for the amount of their subscription. All parties acted in good faith, and without any fraud, misrepresentation or concealment: *Held*, that such notes were, in the hands of the Company, valid binding notes, which the Company had a right to negotiate for the purpose of paying claims or otherwise, in the course of its business, notwithstanding it ultimately appeared that some of the subscriptions were not valid binding subscriptions, and notwithstanding, if the notes had not been given, the defendants might have legally refused to give them on the ground that the condition of the subscription had not been in fact satisfied.¹

¹ *Brookman v. Matcalf*, post.

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2. An agreement by which certain parties agreed to lend to an Insurance Company their notes to amounts specified, and to renew such notes from time to time until a day named, when they should be paid by the Company, the said "notes to be given to N. & S., as special Trustees, to be used by them as they may think proper for the benefit of the Company," is not in contravention of section 7 of "Regulations to prevent the insolvency of moneyed corporations," (1 R. S., 591,) which forbids an assignment or transfer of effects, except to the corporation directly and by name, and it is not void on that ground.
3. When, under such an agreement, and in pursuance of its stipulations, the Company delivered to the so-called special Trustees, as collateral security to provide for the payment of such notes, valid notes of third persons received for premiums in advance, and the notes so lent were discounted and the money paid over to the Company and used by it for the payment of its liabilities in due course of business, the transaction is valid, the transfer of the collateral securities is effectual, and the said special Trustees, or their transferees, (under a power to transfer contained in the agreement,) may collect the said premium notes from the makers.¹
4. A transfer of collateral security made in good faith to secure a present loan to be used in due course of business, is not a transfer with intent to give a preference within the act (§ 9) forbidding transfers by corporations, when insolvent, with intent to give a preference to one creditor over others.
5. An Insurance Company cannot be said to be insolvent, or to act in contemplation of insolvency, within the act last mentioned, merely because the sums insured greatly exceed its capital; nor when its assets are more than sufficient to meet all losses of which the Company has any notice, information or suspicion; nor under such circumstances can a loan made by the Company, secured by collaterals, for the purpose of meeting the liabilities of the Company as they arise, with the belief that the Company is solvent and will meet all its engagements, and in order to sustain the Company in its business and enable it to do so, and with the application of the money raised to that object, be deemed a transfer with intent to give an unlawful preference.
6. Such a transaction is not void for the want of power to borrow notes, merely because the Company, instead of borrowing money with which to meet its engagements, borrowed notes, caused them to be discounted and used the money, under an agreement to pay the notes at maturity.
7. Such a transaction is not void under section 8 of the act which declares that no transfer, not authorized by a previous resolution of the Board of Directors, shall be made by such a corporation of any of its effects exceeding in value \$1,000, when it appears that a resolution was passed authorizing the officers to give such security as they should think proper for those who

¹ *Scott v. Johnson*, post.

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should lend their notes, and the officers did in good faith, without fraud or collusion, deliver a suitable amount as such security, and it further appears, in reference to the particular notes transferred, that the Board also resolved that the officers proceed in liquidation of the liabilities of the Company therewith.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 11th; decided, July 9th, 1859.

APPEAL by the defendants from a judgment ordered for the plaintiff, on a trial before Mr. Justice BOSWORTH, May 21st, 1858, without a jury.

The action is brought to recover the amount of a promissory note made by the defendants, and the defense is, that the plaintiff is not the lawful and *bona fide* owner and holder thereof; that the note was made and delivered to the Atlas Mutual Insurance Company, and transferred to Nelson & Sturges by that Company, upon an unauthorized trust, of which the plaintiff had knowledge when he received it from them.

Further, that the note was given in pursuance of a subscription, whereby the defendants and others were to give their notes when \$300,000 was subscribed; that such amount was never subscribed, but the Company obtained the note by fraudulently representing that it had been subscribed, and this was known to the plaintiff and to Nelson & Sturges, and neither of them gave a valuable consideration therefor.

That Nelson & Sturges were Trustees of the Company; that the Company was insolvent when the note was given, and the transfer thereof was contrary to law and void; and finally, that the Company are indebted to the defendants to an amount greater than the note, which they will set off, &c.

The facts found by the Court, and its conclusions of law thereon, are as follows, viz.:

The defendants being partners, doing business under the name and firm of "Basset, Bacon & Co.," about the 8th of November, 1855, made their certain promissory note in writing, in the words and figures following, to wit:

"\$1,250.

NEW YORK, Nov. 8, 1855.

"Twelve months after date we promise to pay, to our own order, at Marine Bank, twelve hundred and fifty dollars, value received.

BASSET, BACON & Co."

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Thereupon, and about the same date, the defendants indorsed said note, in their said firm name, and delivered the same to the Atlas Mutual Insurance Company.

The defendants were subscribers to a subscription taken by the said Insurance Company, and dated November 8th, 1855, and which is in these words:

"We, the subscribers hereto, agree to give to the Atlas Mutual Insurance Company our notes in advance of premiums of insurance at six and twelve months, in equal amounts, for the sums set opposite our names respectively, it being understood that in consideration thereof the subscribers are to be allowed by the Company, at the maturity of their notes, five per cent on the amount thereof.

"This subscription is towards the \$400,000 subscription authorized by a resolution of the Board of Trustees of this date, and is not to be binding until the sum of \$300,000 is subscribed.

"NEW YORK, Nov. 8, 1855."

The resolution of the Board of Trustees of said Insurance Company, authorizing the said subscription to be taken up, is in these words, viz.:

"*Resolved*, That a subscription in the sum of \$400,000 in premium notes to be written against, be obtained, subscriptions to be binding when \$300,000 is subscribed, including the \$40,000 already subscribed."

The \$40,000 subscription alluded to, in last said resolution, is in these words, viz.:

"We, the subscribers, hereby agree to give our notes for the amount opposite our names at four months, in advance of premiums, to the Atlas Mutual Insurance Company. Notes to be given when \$40,000 is subscribed.

"NEW YORK, Oct. 12, 1855."

In the several books used to obtain subscribers (there being at least eight or nine of such books in use at the same time) to the subscription of the 8th of November, 1858, (and spoken of throughout the testimony in this case as the \$300,000 subscrip-

tion,) that subscription agreement was preceded by a copy inserted in each book of the \$40,000 subscription, and both were preceded by a copy of a subscription called the \$50,000 subscription, which latter subscription was in these words, viz.:

"NEW YORK, Nov. 8, 1855.

"The Trustees of the Atlas Mutual Insurance Company, in order to show their desire and determination to place the Company in an independent position, do subscribe the amounts set opposite their names, on the same conditions set forth in the resolution of the Board of this date, to be paid in cash or notes at thirty, sixty, ninety days, or four months, provided that the amount of three hundred thousand dollars is subscribed under that resolution.

J. S. Sturges,	F. A. Crocker,	} \$50,000."
J. S. Whitney,	J. Boynton,	
S. Knowlton,	L. R. Chesbrough,	
Snow & Burgess,	E. B. Litchfield,	
Ed. A. Lambert,	J. Collins,	
J. E. Southworth,	T. C. Durant,	
Marcellus Massey,		

The defendants subscribed the subscription agreement of the 8th of November, 1855, to the amount of \$2,500.

On the 30th of November, 1855, the Board of Trustees of said Company passed the following resolution, viz.:

"It being understood that \$300,000 is now subscribed, under the resolution of the Board of Nov. 8th, it is therefore Resolved, that the officers commence at once to collect notes to that amount and proceed in liquidation of the liabilities of the Company therewith."

Subscriptions to the amount of \$300,000 had then been made to the subscription of the 8th of November, 1855, including the subscriptions made by Insurance Companies, and including also the said \$40,000 subscription, and exclusive of the said \$50,000 subscription, which was not counted when the calculation was made to ascertain if \$300,000 had been in fact subscribed; excluding the \$40,000 subscription, and those made by Insurance Companies, \$300,000 had not been subscribed.

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There was an original paper called the \$50,000 subscription, in the words of the copy thereof above set forth, and signed by the persons whose names appear on such copy.

When the Trustees of said Company passed the resolution of the 30th of November, 1855, they in good faith believed that the \$300,000 therein mentioned had been actually subscribed, and that such subscriptions had been made *bona fide*.

The note in suit, a copy whereof is above set forth, was, soon after the date of last said resolution, made, indorsed and delivered by the defendants to said Atlas Insurance Company, under the defendants' said subscription. No fraud, misrepresentation or deceit was practised on the defendants to induce them to so make, indorse, and deliver their said note.

On the 14th of January, 1856, the Board of Trustees of said Atlas Insurance Company passed the following resolution, viz.:

"Resolved, That the officers of the Company be and are hereby authorized to arrange with any parties, in or out of the Board of Trustees, for the use of their names, either as makers or indorsers of such paper as it will be necessary for the Company, from time to time, to have; and they may give any security and make such allowance as they shall think proper for the use of such paper."

In pursuance of, and under said resolution, the following agreement was made, viz.:

"NEW YORK, Jan. 15, 1856.

"We, the undersigned, agree to, and with each other, and with the Atlas Mutual Insurance Company, that we will lend our notes to the amount of \$5,000 each, to said Company, and will indorse each other's paper so given to an equal amount, on the conditions as stated below, such paper to be given to T. S. Nelson and J. S. Sturges, special Trustees, to be used by them as they may think proper for the benefit of the Company, and to be made at such date as they require. It being clearly understood that our liability on this paper, either as makers or indorsers, shall be fully secured by a deposit of collaterals, to such an amount and of such character as said Trustees shall think sufficient to cover all the paper used under this ar-

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rangement; such securities shall be placed in the hands of T. S. Nelson and James S. Sturges, as special Trustees for all parties concerned; and we hereby give to said special Trustees full power and authority to sell said collateral securities, or any part or portion thereof, at the Board of Brokers, in the city of New York, or at public sale, or at private sale, or at the option of said special Trustees, and without advertising the same, or otherwise giving us any notice. It is also clearly and distinctly understood, that should any loss occur ultimately to any parties to this arrangement, that such loss shall be borne *pro rata*, by all the parties giving such notes.

"It is also understood that the said notes shall be paid by the Company, by the 1st of November, 1856; but the parties are, in the meantime, to give new paper for renewal for the same, or a lesser sum, until finally paid in full as above.

"Signed on behalf of the Company,

[L. S.]

"E. RUSSELL HINCKLEY,

"Vice-President.

"Attested—GEO. H. TRACY,

THOMAS S. NELSON,
JAS. S. STURGES,
MARCELLUS MASSEY,
JAMES SMITH,
RICH & KNOWLTON,
SNOW & BURGESS,
CROSBY, CROCKER & Co.,
E. C. WILCOX,
L. R. CHESBROUGH,
SMITH & BOYNTON,
SOUTHWORTH, SLAUSSON & Co.
ED. A. LAMBERT,
E. B. LITCHFIELD,
J. S. WHITNEY & Co.,
WOOD & GRANT,
THOM. C. DURANT."

At about the time of, and soon after said resolution was passed, and last said agreement was made, the persons and firms whose

names are attached to said agreement, and relying thereon and on the security of assets of said Atlas Insurance Company, placed in the hands of said Nelson and Sturges, under said resolution and agreement, and which said assets included the note in question, for the accommodation of said Atlas Insurance Company, made and lent to it their several promissory notes at short date, payable at . . . Bank, and amounting, in the aggregate, to about \$40,000; and delivered said notes to said Nelson & Sturges, to be by them used as the agents of and for said Atlas Insurance Company, and who procured the same to be discounted at legal rates, and paid over the proceeds thereof to the proper financial officers of said Company, to be by them applied in the payment of the just and lawful debts of said Company, and they were all so paid out and applied; the said notes so made and lent to said Company were paid by the makers thereof at maturity; and they have not been paid in full the amount of the said notes so lent; nor has enough been realized from said collaterals to pay the same; and the amount owing and unpaid thereon, and uncollected from said collaterals, exceeds the amount of the note in suit and the interest thereon.

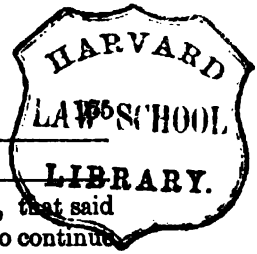
The persons so making and lending their notes did so in good faith, believing at the time that the transaction was lawful and for the benefit of said Company.

All of the persons who so made and lent their notes were, at the times, either trustees of said Company, or belonged to commercial firms, some of whose members were such trustees; and Nelson & Sturges were also trustees; and they knew at the time that the note in suit was given under defendants' said subscription.

On the 8th of November, 1855, the said Atlas Insurance Company was solvent, in the sense that its assets then largely exceeded its known and estimated losses; and its Trustees then honestly believed it solvent, and that its business operations would be continued, and all losses that might occur would be paid. It had at that time risks outstanding amounting to several millions of dollars. The Trustees of said Atlas Insurance Company did not know or believe, either on the 14th or 15th of January, 1856, or at the time when the persons whose names are

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upon said trust agreement lent their notes as aforesaid, that said Company was actually insolvent, or would be unable to continue its business.

About the 1st of January, 1856, the said Atlas Insurance Company had settled about all the claims it then supposed to be due.

During January and February, 1856, large claims for losses, not before heard of by the Company, were presented, amounting in the aggregate to about \$240,000.

The said resolution of the 14th January, 1856, and the said trust agreement made in pursuance thereof, were acts done to meet the new demands about then unexpectedly presented for losses.

The subscribers to the \$300,000 subscription gave notes under the same, amounting in the aggregate to \$212,250; for \$87,750 of the amount so subscribed, no notes have been given by the subscribers.

Of the subscriptions to the \$300,000 subscription, the sum of \$117,000 in the aggregate, was subscribed by the Trustees; the notes given by them, on their said subscription, amount in all to \$69,250, leaving of subscriptions the sum of \$47,750 for which no notes have been given.

No notes were given under the \$50,000 subscription.

Of the subscriptions made to the \$300,000 subscription, other Insurance Companies subscribed, in the aggregate, \$37,000, and the notes given by such subscribing companies amounted in all to \$30,000, and no more.

The defendants knew, before they made and delivered the note in question, that Insurance Companies were subscribers to said subscription.

The said Atlas Insurance Company ceased to transact business on the 5th of March, 1856. An injunction suspending its operations was served on it on that day, and the appointment of a receiver of its property and effects was completed on the 25th of that month, and it proved to be utterly insolvent.

When some of the subscribers were called upon to give their notes for the amount of their subscriptions to said \$300,000 subscription, the Company had become seriously embarrassed, and its failure was apprehended by them, and they refused to give their notes; some claiming to be creditors of the Company to a

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larger amount, and the right to offset the amount of such subscriptions against their claims upon the Company.

All the subscribers to said \$300,000 subscription, at the time of subscribing, did so in good faith, and intending to give their notes for the sum subscribed, according to the terms of said subscription.

The note in suit was transferred by Nelson & Sturges to the plaintiff after its maturity, and who knew at the time he received it, of the manner in which, and the purposes for which, it originally came into the hands of Nelson & Sturges.

The said Atlas Mutual Insurance Company had its existence, and did business, under a charter, a copy of which, and of its by-laws, is inserted in the Case; and its principal place of business was in the city of New York.

No part of the note in suit has been paid by or on behalf of the defendants.

CONCLUSIONS OF LAW ON THE FACTS AS ABOVE FOUND.

I. The note in suit was a valid security in the hands of Nelson & Sturges, and collectible by them, to reimburse to the persons who had lent to the Atlas Mutual Insurance Company their negotiable paper on the security thereof, and on the security of other assets of said Company, the amount of the notes so lent, and paid by such lenders.

II. Holbrook, the plaintiff, has succeeded to the said rights of Nelson & Sturges, and is entitled to a judgment against the defendants for the amount of said note, and interest on it from maturity, which together amounted, at the date of the decision of this action, to \$1,388.78.

J. S. BOSWORTH.

Counsel for the defendants excepted to the conclusion of law, that the note in suit was a valid security in the hands of Nelson & Sturges, and collectible by them for the purposes mentioned in said conclusion.

Counsel for defendants also excepted to so much thereof as held that Nelson & Sturges had a right to hold said note, and other assets of said Insurance Company, to reimburse the persons who had loaned their notes to said Company.

Counsel for defendants excepted to the conclusion of law, that the plaintiff is entitled to a judgment against the defendants for the amount of said note.

Section 12 of the charter of the Atlas Mutual Insurance Company (Sess. Laws, 1843, p. 69, § 8; *id.*, 1842, p. 263, § 12,) is as follows:

"The Company, for the better security of its dealers, may receive notes for premiums in advance of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business; and on such portions of said notes as may exceed the amount of premiums paid by the respective signers thereof, at the successive periods when the Company shall make up its annual statement as hereinafter provided for, and on new notes taken in advance thereafter, a compensation to the signers thereof, at a rate to be determined by the Trustees, but not exceeding five per cent per annum, may be allowed and paid from time to time."

Section 10 of the by-laws of the Company is as follows:

"The President or Vice-President, with the advice and consent of the Finance Committee, or a majority of them, shall have authority to assign, transfer, or otherwise validly dispose of, any bond and mortgages, stocks, bills receivable, or any other assets of the same, in order to convert the same into money, or to secure the repayment of money borrowed by the Company through them, the payment of losses, or other purposes that shall have been sanctioned by the Finance Committee."

And the Finance Committee consisted of five Trustees—the President being a member *ex officio*.

The opinion of Mr. Justice BOSWORTH, at Special Term, disposed of most of the questions raised on the trial, and is, therefore, inserted:

BOSWORTH, J. This action is brought upon one of two notes given by the defendants for the amount of their subscription to the Atlas Insurance Company, upon the subscription of the 8th of November, 1855, called herein the \$300,000 subscription.

The defendants insist that the subscription, by its terms, was not to be binding until the sum of \$300,000 was subscribed, and also that such sum was not subscribed, and, therefore, the note

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would not be obligatory in the hands of the Company, and also insist that the equities of the plaintiff are not superior to those of the Company.

Conceding that the sum of \$800,000 was not subscribed, in subscriptions valid at law, it does not follow that, because no action could have been maintained upon the subscription itself, and the contract it created, that none can be upon notes given by the subscribers to the Company for the amount of such subscriptions. The notes were given in advance of premiums upon insurance which the defendants intended to effect with the Company. They might lawfully give notes for such a purpose, and the Company might lawfully receive them. If they have been given voluntarily for such a purpose, and no fraud has been practised to obtain a delivery of them, they may be enforced by action, although the defendants could not have been compelled to give them, and although no action would have lain against them for refusing to give them.

Stewart v. Trustees of Hamilton College, (2 Denio, 408,) was an action brought upon the subscription itself, as the contract between the parties. *Sandford v. Handy*, (25 Wend., 475,) and *Sandford v. Halsey*, (2 Denio, 235,) were actions upon the original instrument or contract between the plaintiff and the defendants as subscribers thereto.

Berry v. Yates, (24 Barb., 199,) was an action upon the subscription as a contract, to recover the amount due upon it, as damages for a breach of the contract by reason of a refusal to give a note or pay the subscription.

But the defendants, instead of refusing to give, have given their notes, and the Company has negotiated the one in suit and received into its treasury more than the amount of the note advanced on the security of this and other notes; and the question is, can this note be collected by the person so advancing on the security of it and of other notes?

Three hundred thousand dollars was in form subscribed. But various grounds are stated why some of the subscriptions should be regarded as nullities; and why, therefore, it should be held that \$800,000 has not been, in fact or in law, subscribed.

The subscription of \$40,000, taken under a subscription paper dated October 12, 1855, was counted as part of the \$800,000.

The defendants insist that, to make subscriptions to the latter obligatory, it was essential that \$300,000 should be subscribed, exclusive of the \$40,000.

The \$300,000 subscription, by its terms, declares that this "subscription is towards the \$400,000 subscription authorized by a resolution of the *Board of Trustees of this date*, and is not to be binding until the sum of \$300,000 is subscribed." The "resolution" of *that date* reads thus: "On motion, it was resolved that a subscription in the sum of \$400,000, in premium notes, to be written against, be obtained; subscriptions to be binding when \$300,000 is subscribed, including the \$40,000 already subscribed."

Each of the several subscription books, used to obtain subscribers, had in it, and preceding the \$300,000 subscription, a copy of the \$40,000 subscription.

There is no proof that any one who subscribed to the \$300,000 subscription was deceived or misled by anything said or done by any agent of the Company as to the terms of the resolution authorizing that subscription. There is no ground upon the evidence to impute to any officer of the Company any intent to deceive any such subscriber in that respect.

The mere fact, therefore, that the \$40,000 subscription was counted, in order to ascertain if the \$300,000 had been subscribed, is no defense to an action upon the note in suit.

It is also satisfactorily proved there was an original paper called the \$50,000 subscription paper, a copy whereof was written on the first page of the several subscription books used in procuring the \$300,000 of subscriptions.

The fact that several whose names were signed to that paper, or that all of them, subscribed to the \$300,000 subscription, does not invalidate the latter, or affect the liability of any of the subscribers to the latter, notwithstanding no notes were, before the failure of the Company, given under the \$50,000 subscription itself. As to the persons who subscribed to both the \$50,000 and the \$300,000 subscriptions, it may be truly said that, in computing to ascertain if the \$300,000 had been subscribed, their subscriptions to the latter were alone counted, and those made to the \$50,000 subscription were not counted.

If the purpose which they testify they had in view in signing the original paper called the \$50,000 subscription cannot be shown

to exonerate them from liability upon it, on its being made to appear that they subscribed the like amount, or more, to the \$300,000 subscription, it by no means follows that the subscriptions to the latter are not obligatory. The \$50,000 subscription itself was not counted as a part of the \$300,000.

I do not perceive any irreconcilable conflict between the terms of the paper called the \$50,000 subscription and an agreement among themselves, intended to be thereby expressed, and to be thereby notified to those who might be solicited to subscribe to the subscription for \$300,000, to the effect that they would subscribe to the latter the sum of \$50,000 on the same conditions and terms in all respects as the other subscribers, with the single difference that for the \$50,000 so to be subscribed by them, notes should be given at thirty, sixty and ninety days, or four months, instead of notes at six and twelve months.

That paper does not state the proportions in which they were severally to subscribe or had subscribed in subscribing the \$50,000. It declares they subscribe "on the same condition set forth in the resolution" of the 8th of November. And while it declares that, it also declares that the subscriptions were to be paid "in cash or notes at thirty, sixty, ninety days, or four months." Such short notes would be beneficial to the Company, and no prejudice to other subscribers. By the "same conditions" must therefore have been meant, that the notes for the amount subscribed were to be given "in advance of premiums of insurance," and that on the amount of such notes at their maturity, the subscribers were to be allowed by the Company five per cent. There has been no attempt on the part of those persons to appropriate any assets of the Company to secure them for the short notes they gave as subscribers to the \$300,000 subscription. I do not think the transaction furnishes evidence of an intent to defraud persons who should subscribe to the \$300,000 subscription, by giving an assurance not intended to be kept as the parties themselves understood it, and supposed all others would understand it, which of itself will make the note in suit void in the plaintiff's hands. Whether, therefore, they can be permitted to show that they signed the \$50,000 subscription for the purpose and on the understanding to which some of them have testified, in order to escape from liability as such subscri-

bars, is a question which I do not deem it necessary to attempt to determine. I think they acted in good faith at the time, and without any intent to thereby mislead or defraud.

There is no satisfactory evidence that either before or at the time the paper for \$50,000 was signed it was agreed between the signers of it and the Company that any subscription for \$300,000 should be accepted in lieu of, or in satisfaction of, their liability as subscribers to the \$50,000 subscription. Nor that the short notes given for the subscription to the \$300,000 subscription were accepted by the Company in satisfaction of, or as a performance of, the contract created by the \$50,000 subscription.

If there are no other grounds of defense than the two, viz., that the \$40,000 was counted in making up \$300,000 of subscriptions, and that those signing the paper called the \$50,000 subscription did not intend to make and did not suppose they had made themselves liable for the latter amount, in addition to their subscriptions to the \$300,000 subscription itself, the plaintiff is entitled to recover. If the terms of the \$50,000 subscription are such as to preclude those signing from alleging and showing the understanding had between themselves, nothing has since occurred to exempt them from any liability they incurred by signing it, and using it as it was used.

The defendants are sued upon a note which they have made and delivered. The burden of proving facts constituting a defense rests upon them.

I do not think they have established the fact that they were induced by any fraud, practised or intended to be practised on them, to give the notes.

Including the \$37,000 subscribed by Insurance Companies, I have no doubt that the Trustees believed \$300,000 had been subscribed when the resolution was passed which stated that, "It being understood that \$300,000 is now subscribed under the resolution of the Board of November 8th, it is therefore resolved that the officers commence at once to collect notes to that amount and proceed in liquidation of the liabilities of the Company therewith."

Any subscriber being shown a copy of this resolution, or told its contents, and asked for his notes, could not say that any fraud had been practised upon him, if the result should demonstrate

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a small error in computation, or an error in treating a copy of one or two subscriptions as an original. The fact may turn out to be contrary to his belief; but in such a case there would be no misrepresentations to deceive, nor any intent to defraud him; and a subscriber asked to give notes under such circumstances would be notified of the purpose of the Company to use them immediately in liquidating its liabilities. Using them for such a purpose would not be a misappropriation of them as between himself and the Company, nor would such a use of them be a fraud or surprise upon him.

Does the use made of them create a bar to the right of those to whom they were negotiated, to sue upon and collect them?

The Company, to put itself in the possession of money, must procure the notes to be discounted or borrow on the security of them. If solvent, I see no difficulty in the Company's procuring money in either mode. Either form would be a valid transaction. Certain gentlemen, of such credit that their notes at short dates would be discounted, advanced such notes on the security of the note in suit and other notes. The notes so advanced, the Company converted into money, and used the money in paying the just debts of the Company. The notes so advanced were paid. Why should not those advancing and paying their notes, collect from the securities on which they advanced, enough to reimburse the sums so advanced?

I can see no answer to their right to do so, in any of the facts of the case thus far considered, unless the fact that the persons so advancing were Trustees of the Company, is of itself a good answer. I cannot think that if such an advance, when made by third persons, would be legal, and the transaction upheld, that Trustees so advancing lose all right to enforce such a note as the one in suit, merely because they were Trustees when they advanced or loaned to the Company on the security of some of its premium notes.

Nor do I think that the defendants can escape liability upon the idea that the Company was, or was supposed by its Trustees to be, insolvent either on the 8th of November, 1855, or when the note in suit was transferred, with others, to secure advances made on their credit, in any such sense that such a transfer was prohibited and made void by statute.

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On the 8th of November, 1855, the assets of the	
Company amounted to.....	\$701,238 60
Its liabilities, including the estimate of losses, on	
claims then presented, were.....	578,458 76
<hr/>	
Surplus,	\$127,779 84

It continued its business as usual, for some months thereafter.

But a small amount, not over \$20,000, (as I remember the testimony,) of these assets were either supposed to be or proved to be bad. The Company had, it is true, a large amount of pending risks. These proved to be unfortunate ones; so much so that they, in a few months, produced claims for losses which forced the Company into the hands of a Receiver.

I have no doubt the Trustees of the Company believed the Company would continue its business at the time subscriptions to the \$300,000 were being made, and when it was resolved to collect the subscription notes; and might in good faith honestly so believe in coming to a conclusion upon that point, upon such considerations as influence men in business of that character.

That the Company needed present means to pay liabilities on the 8th of November, 1855, although its assets exceeded in value the amount of its known or estimated liabilities by more than \$100,000, is undoubtedly true. Every subscriber presumptively knew that the object of the subscription was to increase the resources of the Company, and furnish means to enable it to pay, the more easily and readily, its liabilities.

But there is nothing in that fact, or in the actual condition of the Company when viewed as its Trustees regarded and might honestly regard it, which makes this note void in the hands of Nelson & Sturges, whether the circumstances and purposes under and for which it was made and delivered, or those under and for which it was transferred to Nelson & Sturges, are considered.

There is nothing in the fact that all who signed the \$300,000 subscription have not given their notes, which can exonerate the defendants from liability. All the individuals and firms who signed it, did so, at the time, in good faith. It is true, that the Company having become embarrassed before all of the subscribers were required to give their notes, some of them being

creditors refused to give notes, taking their chances of effecting an off-set of their demands. But if such a subscription, signed, is as effective in law to create a liability as notes given to the Company for the purposes specified in the subscription itself, it is difficult to perceive on what ground the subscribers can escape from liability, except the single one that \$300,000 was not in fact subscribed.

In the present case, as already stated, my opinion is, that the defendants, upon the evidence given in this action, do not stand upon as favorable a footing as if sued on the subscription itself, for refusing to give notes. They have given these notes, and this suit is upon one of them. No fraud was practised upon them, either by any misrepresentation made, or the fraudulent concealment of any material fact, to induce them to give the note.

If such a subscription would not of itself create a liability on which an action will lie, either because it is not authorized by the charter, or for any other reason, then a subscriber who has not given a note may be in a better condition than one who has.

Whether the Insurance Companies who subscribed, and gave their notes, had power to make subscriptions valid in law, it is unnecessary for me to determine. It was undoubtedly supposed they had the power. The defendants knew, when they subscribed, that subscriptions had been made by such companies, and must have supposed that such subscriptions were to be counted as part of the \$300,000. If it turns out that those companies could not be made to pay, such a mistake would not avoid these notes in the hands of persons who had advanced money to the Atlas Insurance Company on the credit and security of the notes themselves.

Of the Insurance Companies which subscribed, all but two gave notes, and notes amounting to \$30,000.

As the evidence stands, the Philadelphia and International Insurance Companies made subscriptions which could not have been enforced, conceding that, if made by competent authority, they would be obligatory. It seems that the different companies insured, or reinsured, in some instances with each other; and I do not find any fraud, or intent to defraud, in taking these subscriptions, or counting them as a part of the \$300,000.

Without stopping to inquire what force would be due to such a fact, in an action against a subscriber for refusing to give his note, yet, as in this case notes have been given without any fraud having been practised in procuring them, I think Nelson & Sturges, and the plaintiff as succeeding to their rights, has equities superior to those of the defendants.

If the subscription of A. C. & L. R. Chesbrough was counted at \$13,000 or \$13,500 to make up the \$300,000, it was counted at no more than it was made.

If altered since, it was done, as the evidence stands, without authority; and their liability is the same as if the subscription now remained as originally written; what effect the substitution and acceptance of other responsible subscribers for a part or the whole of the amount of the reduction may have upon the liability of the Messrs. Chesbrough, it is unnecessary to attempt to determine now.

If all the subscribers whose subscriptions were counted as part of the \$300,000 (excepting the Insurance Companies) had given their notes under the same circumstances that the present defendants gave theirs, and a part of them had passed into the hands of the Receiver, and if payment of them was necessary in order to provide means to pay the just creditors of the Company, I think the Receiver could have collected them. (1 Comst. R., 371; 4 id., 51.)

Nelson & Sturges did not take the note in suit to secure themselves, or other trustees, for preëxisting debts or liabilities, but for money advanced at the time, and on the security thereof, to be used, and in fact used, legitimately in prosecuting the ordinary business of the Company.

In brief, the case is this: It was supposed that \$300,000 of subscriptions had been made. Believing this, the defendants gave their notes. No fraud was intended or practised to induce them to give the notes. Except in so far as the notes find their consideration in the fact that others also gave their notes for the same general purposes, and the giving of notes by one induced the giving of notes by others; and in the statute which authorized them, and makes them obligatory when the statute has been complied with, the defendants *trusted* to the *Insurance Company* to furnish or pay the consideration of the notes, by insuring

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until the premiums amounted to the face of the notes. But those whom the plaintiff represents advanced their money on the credit and security of the notes themselves, and not on the credit or responsibility of the Company. At best, there has been a common and mutual mistake of facts. To rescind, all parties who have parted with money or property in good faith must be put in *statu quo*. The plaintiff cannot be compelled to give up the note in suit, or prevented from collecting this note, until the amount advanced on the credit of it, and of other notes, has been refunded.

My conclusion, therefore, is, that the plaintiff is entitled to recover the amount of the note and interest, which at this date is \$1,888.78.

From the judgment entered in favor of the plaintiff, in conformity with the decision, the defendants appealed.

Gilbert Dean, for defendants, (appellants.)

I. The Atlas Insurance Company was a "moneyed corporation." (1 R. S., 598, 599, §§ 51, 52, 53; 5 Seld., 589; Charter of Company, 17 N. Y. R., 554.)

II. The transaction which is held to be valid by the finding in this case, comes directly within the prohibition of section 7 of the Revised Statutes, to prevent the insolvency of moneyed corporations. (1 R. S., 591.)

1. This was a transfer of \$40,000 of "effects" to be used "for the benefit of the Company."

2. The transfer was not made "to the Company directly or by name," but to "Nelson & Sturges, special trustees for all parties concerned."

3. The powers given to these "special trustees," to take an unlimited amount of the assets of this corporation as security, and to dispose of the same without notice, shows the wisdom of the legislative prohibition.

4. The object of section 7, says Judge SELDEN, was "to prevent the property of the corporation from being placed beyond the control of its Board of Directors." (17 N. Y. R., 554.)

"It was intended as much for the benefit of *stockholders* as of *creditors*."

III. The corporate powers of this Company could only be exercised by the Board of Trustees, not less than eleven constituting a quorum. The Board could not delegate their powers to two of their number, and authorize them to take its assets without limit and to make of them any disposition they chose. (1 Sug. on Pow., 340, 341; *Cole v. Wade*, 16 Vesey, 27; 3 Comst., 396; 2 Seld., 92.)

1. This corporation was created for the purpose of effecting insurance, and could, by the 12th section, receive "*notes in advance of persons intending to receive its policies.*" It had no power to borrow notes. (2 Kern., 569.)

2. The rate of compensation which it could allow for notes so received in advance, was fixed—"five per cent." The resolution in this case not only authorized the officers to give any security, but to make any allowance for the use of the names of parties.

3. A statute corporation, created for a particular purpose, has such powers, and such only, as are conferred upon it by the statute, and is confined strictly to those powers.

The statute is an enabling act, and enables it to do everything it may lawfully do. (*Head v. The Providence Ins. Co.*, 2 Cranch, 167-169; 2 Kent, 290-299, 5th ed.; *The Queen v. The East. Co. R. W. Co.*, 10 Ad. & El., 531.)

4. The principle is also affirmed by the Revised Statutes, which declare that in addition to the powers enumerated in the 1st section of the title, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. (1 R. S., 600, § 3.)

5. The officers of a corporation are not the corporation; they are only its agents, and cannot bind their principal by an act which is either unauthorized by the charter or forbidden by law. (*U. S. Bank v. Dandridge*, 12 Wheat. R., 64; *Salem Bank v. Gloucester Bank*, 17 Mass. R., 1, 28, 29.)

6. The powers of a corporation are not only in writing, but they are matter of law; and there is no color for saying that the officers can bind the principal when acting beyond the scope of the corporate powers. Persons dealing with such officers must see to it that the act is authorized by the charter. (*Mechanics'*

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Bank v. N. Y. & N. H. R. R. Co., 3 Kern., 599; *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. R., 502, 508-572; *Wyman v. Hal and Aug. Banks*, 14 Mass. R., 58, 63; *Salem Bank v. Gloucester Bank*, 17 id., 1, 28, 29.)

IV. The power given to Nelson & Sturges to take an unlimited amount of the assets of this Company, and to sell them at their option, is a direct violation or repeal of section 8 of the act before referred to.

V. The defendants, being interested as creditors and stockholders, may take advantage of a statute "to secure their rights."

VI. A corporation, or its stockholders or receivers, may in every case impeach any contract made by directors or other officers or agents, in the name and professedly by such corporation. (2 Denio, 110; 5 id., 567; 3 Barn. & Ald., 1.)

But the defendant, without reference to his connection with the Company, may defend for want of title in plaintiffs. (*Johnson v. Bush*, 3 Barb. Ch. R., 207.)

W. Britton, for plaintiff, (respondent.)

I. There was no illegality in the transfer, for the transaction under which the note was transferred to Nelson & Sturges was valid.

1. It was but a loan by the parties thereto, for whom Nelson & Sturges acted, to the Company, and taking collateral security thereto, which is clearly legal. (*Charter Atlas Co.*, § 12, "Atlantic;" *Barker v. Mechanic Ins. Co.*, 3 Wend., 96; *Munn v. Commission Co.*, 15 Johns., 44; *Attorney-Gen. v. Life Ins. Co.*, 9 Paige, 470; *Moss v. Oakley*, 2 Hill, 265; *Barry v. Merch. Etc. Co.*, 1 Sandf. Ch., 280; *Beers v. Phoenix Glass Co.*, 14 Barb., 358; *Curtis v. Leavitt*, 15 N. Y. R., 62-65; *King v. Merch. Etc. Co.*, 1 Seld., 547; *Furniss v. Gilchrist*, 1 Sandf., 53.)

2. If a trust by the Company, it was competent for the Company to make such a trust. (*Angell & Ames on Corp.*, § 241; *Curtis v. Leavitt*, 15 N. Y. R., 62-65; *De Ruyter v. St. Peter's Church*, 3 Comst., 238; *Nelson & Sturges v. Eaton*, 15 How. Pr. R., 805; *Barry v. Merch. Etc. Co.*, 1 Sandf., 280; *Leavitt v. Blatchford*, 17 N. Y. R., 584, *et seq.*)

3. If not valid *in toto*, there is no invalidity in any portion under which plaintiff claims. The maxim, "void in part

void *in toto*," is not, in general, law, and this is not an exceptional case. (*Curtis v. Leavitt*, 15 N. Y. R., 96, 97.)

4. Nor can it be objected that the agreement was void for non-compliance, on the part of the Company, with part 1, title 2, chap. 18, art. 1, sec. 8 of the Revised Statutes; for,

(a.) That section is in conflict with the 12th section of the charter of the Atlantic Company, made a part of the charter of the Atlas, and the charter having been last enacted, the Revised Statutes must yield. (*Howland v. Meyer*, 3 Comst., 293.)

(b.) But if that section of the Revised Statutes does apply, the resolution passed January 14th (appearing in minutes of 29th) authorized the transaction.

(c.) If not authorized by the resolution, it is only invalid as against the Company, its Receiver, or judgment creditors; defendants are not in a position to set it up. (*Nelson v. Eaton*, 15 How. Pr. R., 305; *Tracy v. Talmage*, 4 Kern., 162; *Curtis v. Leavitt*, 15 N. Y. R., 240, 106, 107; *City Bank of Columbus v. Bruce*, 17 N. Y. R., 515.)

(d.) Moreover, the Company, by accepting the benefit of the transfer, ratified the act, which ratification, in its legal effect, is equivalent to previous authority. (*Curtis v. Leavitt*, 15 N. Y., 48-50; *Reuter v. Electric Tel. Co.*, 88 Eng. C. L. R., 341; *Palmer v. Yates*, 3 Sandf., 138.)

BY THE COURT.—WOODRUFF, J. The full discussion of the various questions arising on the trial of this case found in the opinion of Mr. Justice BOSWORTH at Special Term, has narrowed the controversy between the parties to a very few points. For the most part, that opinion appears to have been satisfactory, and no point or argument is made on the appeal addressed to the principal matters discussed there.

It has not, therefore, been claimed here that the note upon which this action is brought, was not a good and valid note in the hands of the Atlas Insurance Company, to whom it was delivered by the defendants, or that it would not be valid and collectible if it were now in the hands of the Receiver of that Company; nor that there was any proof that it was obtained by fraud or misrepresentation; nor that the defendants are relieved from the obligation which its terms import, by reason of any

proof that the condition of their agreement or subscription was not satisfied.

These points, and others which were discussed at Special Term, not having been raised on the appeal, and the opinion there pronounced not having in those particulars been assailed, we shall assume that the note is a valid binding note obtained without fraud or misrepresentation, given upon a sufficient consideration, and collectible by the Atlas Insurance Company, or its Receiver; and we shall also bear in mind that the note was received by the Company for premiums in advance from the defendants, who intended to receive its policies.

If the views expressed at Special Term had not been thus acquiesced in, our reflection upon the points involved would lead us to say that they have our entire concurrence.

The question therefore discussed on the appeal, and the only question, was, whether the plaintiff has such a title to the note that he can maintain the action thereon and recover from the defendants?

There is no formal defect in the title. The defendants made the note payable to their own order, and indorsed it in blank; it thereupon became transferable by delivery, and the possession of the note, and its production by the plaintiff, makes his formal title complete. But in fact the defendants delivered the note to the Atlas Insurance Company; that Company delivered the note to Nelson & Sturges under the agreement found by the Court, and to be presently considered, and the plaintiff received the note from Nelson & Sturges after its maturity, and knowing at the time the circumstances under which they received it. He is therefore in no better situation than Nelson & Sturges would be had they brought the action. It is therefore their title that is assailed.

The transfer to Nelson & Sturges is claimed to be illegal and void. It is necessary for the defendants to go to that length, for if that transfer is not void, but voidable only by the Company or its Receiver, then the plaintiff is entitled to recover, because neither the Company nor the Receiver having avoided the transfer or claimed that it was not in all respects fair, proper and equitable, and having made no claim upon the defendants, the latter are protected in paying it to the plaintiff as holder.

But the transfer by the Company is alleged to be void, upon these grounds: That the Company was insolvent at the time of the transfer, and therefore any transfer of its assets was unlawful; that not only on this ground, but also because it violated the statute, the trust upon which the transfer was made to Nelson & Sturges was illegal and void, and also because the Company had no power to borrow notes; and that the transfer to Nelson & Sturges, embracing in amount more than \$1,000 of notes, was not sufficiently authorized by the Board of Directors, and was therefore void. These points are founded, or claimed to be founded, upon the provisions of sections 7, 8 and 9, of article 1st, of title 2d, of the 18th chapter, of part 1 of the Revised Statutes. (1 R. S., 591.)

In relation to the first point, it must suffice to say that the finding of facts does not support it, and the evidence supports the finding. Section 9 of the statute forbids any assignment or transfer when insolvent or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the Company. In the first place, the Company had settled its losses up to the 1st of January, 1856, and down to the 15th of January had no knowledge of any losses which rendered the continued solvency of the Company doubtful, but on the contrary, its trustees and officers believed it entirely solvent; they could not, therefore, have made the transfer with intent to give a preference. In the next place, the liability to be called upon in the future for losses which may exceed the capital or assets of an Insurance Company, is not insolvency within the meaning of that statute. If it was, then it would never be proper for an Insurance Company to take risks exceeding the amount of its capital, since with those risks outstanding there is a liability to insolvency at any moment. The business of insurance, from its very nature, requires for its success the capacity to take risks to an amount greatly exceeding its capital, and it can never be deemed insolvent in the sense that its payments and transfers, in due course of business, can be said to be with intent to give a preference to one creditor over another, until its officers or agents are notified of losses which they are unable to pay. Again, the transfer in question was not within the statute; it was not in any sense a transfer to give a preference to a creditor; it was merely

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giving security for an equivalent sum or amount then received. It was not a diminution of assets, but a raising of money and a contemporaneous parting with securities, not to pay or secure a debt, but simply to provide for the return of the sum borrowed. Negotiation of bills receivable, and obtaining money thereon for the proper uses and purposes of the Company, is not of itself, and without collusion or fraudulent intent, a transfer of property to give preference to a creditor. And, once more, the transaction was to assist in sustaining the Company in carrying on its ordinary business and paying its losses, and with the expectation that its business would be continued, and not for the purpose of preferring any one or in any anticipation that all would not be paid. Such a transfer is lawful. See observations on this subject in *Hoyt v. Sheldon*, (8 Bosw., 303-306,) and the cases cited.

It is next claimed that the agreement, in pursuance of which the note was delivered to Nelson & Sturges, was void, and the transfer therefore void, because a trust was created by the agreement, which was void under section 7 of the act above referred to, which declares that "no conveyance or transfer of any effects for the use, benefit or security of any such" (moneyed) "corporation, shall be valid in law, unless it be made to the corporation directly and by name."

We understand the counsel for the appellant, in his argument upon this point, to insist that the advance agreed to be made by Nelson, Sturges, Massey, Smith and others, who signed the agreement of January 15th, 1856, and the delivery of their notes to Nelson & Sturges, to the amount of \$40,000, was such a transfer as is forbidden by the statute.

The answer to this suggestion is twofold. If by any latitude of construction an agreement to advance notes to a corporation, and to indorse notes for its benefit, the notes to be used for the benefit of the Company, could be deemed a transfer of effects within the statute, and therefore invalid, the consequence would simply be that the agreement could not be enforced. Neither party could compel its performance. But if the notes are advanced and they are converted into money, and that money is paid to the corporation and used by it in its proper and ordinary business, the securities given for its repayment cannot be reclaimed without refunding the money.

The transaction was not in any sense within this statute. There was no transfer of effects to any other than to the Company. The subscribers to that agreement lent to the Company, not effects, but their promises to pay; and when lent, they were lent to the Company itself in very terms. They were designed to be used for the benefit of the Company, and the intervention of Nelson & Sturges, to see that the manner in which they were applied to the use of the Company was such as would secure the beneficial object of the parties in lending their notes, did not render the notes any less the property of the Company.

It was with reference to the resolution of the 14th of January, and in subordination to its provisions, that the agreement of the 15th was made, and the two together show that it was the design of all parties that the Company should have the notes and indorsements provided for. Those who signed the agreement agreed with the Company, as well as with each other, "to lend their notes to the amount of \$5,000 each to said Company;" and the Company agreed that the lenders of the notes should be secured by such an amount of collaterals as Nelson & Sturges should "think sufficient," and that Nelson & Sturges might sell the collaterals at public or private sale, if the notes thus lent were not paid by the Company by the 1st of November, 1856, and in the meantime the lenders should renew the notes. The phrase, "Such paper to be given to T. S. Nelson and J. S. Sturges, special Trustees, to be used by them as they may think proper for the benefit of the Company, and to be made at such date as they require," did not constitute Nelson & Sturges assignees or transferees of such paper for the use, benefit or security of said Company, in any such sense as is contemplated by and prohibited in section 7 of the statute. It designates Nelson & Sturges as persons to whom the notes may be delivered in order to make a delivery of them to the Company. It designates them as persons authorized by the Company to call for the notes agreed to be lent, and for new notes to renew those so lent. But the Company did not thereby intend to devolve upon Nelson & Sturges the sole and unlimited discretion and authority to use the notes as they saw fit, and certainly not to vest in them the title to the notes. By the resolution of the 14th, the officers of the Company were authorized to arrange for the making and

indorsing by individuals of "such paper as it will be necessary for the *Company*, from time to time, to have;" and by the agreement of the 15th, the subscribers agreed to "lend their notes to said *Company*." It would be a very strict construction, and one subversive of the evident design and purpose of the parties, to hold that the *Company* deprived itself of the power to direct the use to be made of the notes lent, while it in terms agreed to pay them, and gave security for the performance of that agreement.

The lenders undoubtedly agreed that any use might be made of the notes which Nelson & Sturges might "think proper for the benefit of the *Company*." And it may perhaps be conceded that the *Company* agreed that no use should be made of the notes which Nelson & Sturges should think not proper for the benefit of the *Company*. But that is quite different from divesting the *Company* of the title to the notes, or vesting it in Nelson & Sturges, or depriving the *Company* of all power of legal control or direction over the notes or the use which should be made of them. In this construction of the agreement, it might happen that, the *Company* and Nelson & Sturges disagreeing, the loan would fail to serve any useful purpose; but if it did, the only result would be that the notes would be returned to the lenders, and their claim to the collateral securities would be at an end.

Again, the statute prohibition fails to reach this case, because it was a mere loan of the credit of the various subscribers to the agreement, to be used in such manner as Nelson & Sturges should approve; and against any loss by reason thereof, the parties were to be indemnified by the *Company* by its paying the notes lent. Now, the statute has no application to such an arrangement. The lenders had a perfect right to annex such conditions and qualifications to the use which should be made of their credit as they saw fit, and the *Company* might agree that no other use should be made of that credit. The arrangement might, or might not, be beneficial. The *Company* might, or might not, be able to use the credit in conformity to the conditions imposed; but, if not, then all that can be said is, that the arrangement failed of its end, and the notes would be returned to the lenders.

In this particular case, it was a useful arrangement, and it produced the money which was received by the *Company* and applied to the payment of the debts of the *Company*, and, as we think,

left the Company, in every aspect, bound for its repayment and the collateral securities well pledged for the performance of the obligation. The claims of those who lent their notes is as meritorious as if they had themselves procured the notes to be discounted and lent the money to the Company without its passing through the hands of Nelson & Sturges. The Company and its creditors have been as much benefited by the transaction in the one form, as if it had been done in the other. And we do not perceive that any rule of law, least of all the section of the statute referred to, (§ 7,) stands in the way of the lenders insisting upon enforcing payment of the collaterals on the faith and security of which they lent their notes.

If anything further was wanting to show that this transaction is not within the prohibition of the section of the statute cited, (§ 7,) it is made quite clear by reference to the design and object of the section, which is, as stated by Mr. Justice SELDEN, "to prevent the *property of the corporation* from being placed beyond the control of its Board of Directors," (*Leavitt v. Blatchford*, 17 N. Y., 554;) and this, and the 8th section, "were intended for the protection, not only of creditors, but of stockholders also." Here was no removal of the property of the corporation from their control. It would be a perversion to say that the borrowing of the notes in question, receiving the full proceeds thereof when discounted, and securing the repayment by a proper amount of collaterals in good faith and without any collusion or fraudulent intent, was putting the property of the corporation beyond its control.

So, also, we think it is a perversion of the true meaning of the agreement to argue that it authorized Nelson & Sturges to take an unlimited amount of the assets of the Company and dispose of them. It only required, and only stipulated, that such an amount of collaterals should be deposited with Nelson & Sturges as they, acting in this regard as agents for the parties to be protected, might deem sufficient to cover the amount of paper advanced. Here is no latitudinarian discretion given to take assets of the Company without limit. The Company were bound, and only bound, to give assets reasonably sufficient to cover the liabilities incurred by the lenders; and the terms of the instrument would be so construed.

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But it is again said, that the trust is void because the Atlas Insurance Company had no power to borrow notes. We are pointed to no rule of law and no authority for the proposition that a corporation may not receive the note of a person desiring to aid it, cause it to be discounted, apply the proceeds to the proper purposes of its business, (as by paying its just debts,) and do all this under an express agreement to refund the amount or to pay and return the note borrowed. The note of the present defendant was a subscription note, given in advance for premiums. It was a note held by the Company, under the 12th section of its charter, by which the Company was authorized to negotiate such notes for the purpose of paying claims or otherwise in the course of its business. Instead of causing this note to be discounted, the Company deposited it as security for other notes which were discounted, and the money duly applied to the proper business of the Company. There was no want of power in the Company to raise money for such a purpose. The substantial result was the same as if the note had been negotiated absolutely. The liability of the Company was thereby made no greater than if the note had been negotiated or discounted with the Company's indorsement. In this we perceive no excess of power, but rather an exercise of power plainly conferred, if in truth it was not possessed by the Company independent of the provisions of the 12th section of the charter. (*Bank of Genesee v. Patchin Bank*, 18 N. Y., 309; 19 *id.*, 312; *Marvine v. Hymers*, 12 *id.*, [2 Kern.,] 223; *Central Bank of Brooklyn v. Lang*, 1 Bosw., 202; *Ogden v. Raymond*, Gen. Term, May, 1859.¹)

The only remaining point which, it seems to us, to be material to consider, is, the objection that the transfer of this note to Nelson & Sturges was void because the agreement in pursuance of which the transfer was made was in violation of section 8 of the statute above referred to, which forbids the transfer of assets to an amount exceeding \$1,000, without a previous resolution of the Board of Directors.

The first and most obvious answer to that suggestion is, that the transaction was distinctly authorized by the Board of Directors, by the resolution of the 14th of January. If it were otherwise, it is gravely questioned whether the authority of the 12th

¹ *Ante* p. 16.

section of the charter does not obviate the force of the 8th section in reference to such notes as the present. But, in our opinion, the resolution of the Board did sufficiently authorize the officers of the Company to deliver the note as security for the notes loaned and the money received thereon; and especially so when considered in connection with the previous resolution of the 30th of November, 1855, which directed the officers to proceed with the subscription notes to liquidate the indebtedness of the Company. The argument proceeds upon the idea that the agreement authorized Nelson & Sturges to take an unlimited amount of the assets of the Company, whether the officers of the Company assented or not, or whether the officers deemed the amount reasonable in reference to the amount of loan to be secured or not. This construction has already been considered, and rejected. The officers of the Company were authorized by the Board to give such security as they thought proper; and the just construction of the agreement is, that they would place in the hands of Nelson & Sturges an amount which they might reasonably deem sufficient to cover the paper loaned to the Company.

In conclusion, we are satisfied that there is no just ground for impeaching the right of Nelson & Sturges, or of the plaintiff as their transferee, to collect the note now in suit, the Company having had the full benefit of the money the repayment of which it was pledged to secure, that money having been applied by the Company to its lawful and proper purposes, and not having been repaid.

The judgment must be affirmed.

Judgment affirmed.

THOMAS S. NELSON and JAMES S. STURGES, Trustees, &c.,
Plaintiffs, v. ISAAC B. WELLINGTON, Defendant.

1. Where an Insurance Company, in order to raise money for the immediate purposes of its business, borrowed notes from its friends and they were discounted and the money paid over and so used, and by the agreement the Company were to pay such notes and to secure that payment were to deposit and did deposit with the plaintiffs, as Trustees, certain negotiable notes received in its business as collateral security, with authority to sell such collateral securities or any portion thereof at public or private sale at the option of the Trustees: *Held*, that a sale was not the only mode in which the securities could be rendered available. The power so given was not exclusive of every other authority. The Trustees had a right to receive payment of such collateral notes and to enforce payment by action.
2. Where promissory notes are pledged as security, the transaction *ex vi termini* imports authority to collect. Superadding a power to sell, which without express agreement would not exist, does not take away the right to receive and to compel payment.
3. Where negotiable notes are by express agreement pledged as collateral security to secure the payment of money by the pledgor which he agrees to pay, the pledgee may sue in his own name on such notes, although the indorsement made thereon to carry the agreement into effect is in terms "pay to A. B." (the pledgee) "for account of C. D." (the pledgor.) Such an indorsement is not inconsistent with the lien of the pledgee and the right of the latter to collect the notes and to apply them to the account of the pledgor by discharging the debt they were pledged to secure.
4. Where a note is given to an Insurance Company for the nominal premium upon an open policy, which policy was to attach to all risks that might thereafter be indorsed thereon and risks on which the agreed premium amounted to one-third of the note were so indorsed, and afterwards another risk at an agreed rate of premium on all goods shipped by the maker by a vessel named and for a specified voyage, was indorsed on the policy, the maker agreeing afterward to report the amount of the invoice; such note is a note for valuable consideration, and in the absence of any evidence of the amount of the shipment last mentioned the maker is liable for the full amount of the note.
5. A transfer by a moneyed corporation of negotiable notes, as collateral security to secure a present loan to be used in due course of business, is not a transfer with intent to give a preference to one creditor over others, within the act forbidding such transfers by a moneyed corporation when insolvent. And therefore upon that state of facts it is not error to reject evidence that at the time of the loan the corporation was insolvent.

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6. See decision in *Holbrook v. Basset*, (ante p. 147,) which involved many points also decided in this case.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 15; decided, July 9, 1859.

THIS action was brought to recover from the defendant, as maker, the amount of a promissory note dated November 24th, 1855, for \$351.25, payable eight months after date, to the order of The Atlas Mutual Insurance Company. And the plaintiffs sued as Trustees of an express trust under the agreement made on the 15th of January, 1856, between the Company and Nelson, Sturges, Massey, Smith and others, set out in the foregoing report of the case of *Holbrook v. Basset*, (pp. 152, 153,) and averred that the parties to that agreement made and loaned their notes to the Company which were used as required in the agreement, and that the note in suit was transferred to the plaintiffs as collateral security in pursuance of that agreement. That before the maturity of the notes loaned by the parties thereto, the Company failed and became insolvent and did not pay or take up the same, and that there is still due to the said parties and unpaid a sum greater than the amount of the note of the defendant in suit.

The defendant by his answer denied that the plaintiffs are lawful holders and owners, and all allegations in relation to the trust, and denied that anything was due or unpaid by the Company as alleged.

For a further answer he alleged that the note in suit was given to the Company "as a memorandum of premiums in advance upon an open policy of insurance" upon merchandise to be shipped from New York to San Francisco, when said risks should be thereafter reported to the Company and indorsed on the policy or otherwise accepted; and that after the policy was issued no premiums were earned and the same was and is without consideration, of which the plaintiffs had notice when they took the note. And further that the Atlas Insurance Company was insolvent when the plaintiffs received the note, and the transfer was made in violation of the statute to prevent the insolvency of moneyed corporations, and with a view to give a preference to Massey and other officers and creditors of said corporation over other creditors of the corporation.

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The cause was tried on the 21st day of October, 1858, before Mr. Justice WOODRUFF and a jury.

It appeared, on the trial, that the plaintiffs acquired title to the note under the same agreement and by the same action of the Board of Directors as are fully stated in the report of the case of *Holbrook v. Basset*, (*ante* 147, *et seq.*) That agreement was produced and admitted in evidence, by consent, in the terms there stated. But the note itself was given to the Atlas Insurance Company for the nominal premium upon an open policy. That the course of dealing and understanding in such cases was, that the open policy covered risks which were indorsed thereon. When application was made for an indorsement, sometimes the amount of the goods covered was stated and the premium settled, and so the precise amount of premium earned ascertained. And sometimes the amount of the goods was not stated, but the name of the vessel, the nature of the cargo, and the voyage, were stated, and the rate of premium was fixed; in which case, the whole invoice of the shipment by that vessel would be covered. And afterwards, when the insured ascertained the amount of the shipment by that vessel, he would report it to the Company, and the amount of the premium earned could then be computed.

That the defendant had indorsed on his open policy two risks, the premiums on which amounted to \$102.75, and a third risk on a shipment "per Reporter," from New York to San Francisco, at three and a half per cent premium, 27th November, 1855, the amount of which shipment the defendant had never reported to the Company.

On the trial, the defendants' counsel inquired, "Does the Company owe Mr. Wellington for losses now?" This was objected to, the objection sustained by the Court, and the defendants excepted.

The defendants also put several questions respecting the solvency of the Atlas Insurance Company on the 15th of January, 1856, with a view to prove its insolvency at that time; which were also objected to and excluded, and the defendants excepted.

When the note in suit was produced by the plaintiffs and read on the trial, the indorsement of the payees thereon appeared in the following form:

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"Pay....., for account of the Atlas Mutual Insurance Company.

"GEORGE H. TRACY, *Secretary.*"

The defendant moved for a nonsuit on the following grounds:

1st. That the plaintiffs have no right to sue.

2d. That the transaction, as it appears, was contrary to the statute.

3d. That it was not within the powers of the corporation to make such a trust as this one on which plaintiffs rely.

4th. That, by the indorsement on the note, no title passed.

The motion was denied, and the defendant excepted.

When the parties respectively had closed, (but under what instructions, by way of charge, the Case does not state,) the Court directed the jury to find a general verdict, and also to find a special verdict; and the jury thereupon rendered a general verdict for the plaintiff for \$404.55; and they found specially as follows:

"The jury find specially the amount of premiums earned upon the open policy upon which this note in question was given and indorsed on such policy, with the interest thereon, is \$118.80. They also find specially that on the 27th November, 1856, the Atlas Insurance Company agreed further to insure and did insure a shipment of goods made by the defendant from New York to San Francisco, at the rate of three and a half per cent premium upon the amount of the shipment, which insurance was indorsed on that date upon the said policy, upon the agreement that the defendant would, as soon as his account of the shipment was made up, report such amount to the Company, and the amount of the premium should then be fixed by computation, and that the defendant never reported the amount to the Company, and there is no evidence that the amount was ever demanded of him. Under the proofs given in relation to the facts thus specially found, and all other matters in issue, they find for the plaintiff, and assess his damages at the sum of \$404.55."

The parties respectively in open Court stipulating and consenting that the General Term shall dismiss the complaint, if of opinion that the defendant's motion therefor at the trial ought to have

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been granted, or reduce the amount of the verdict to \$118.80, if of opinion that the plaintiffs are entitled to recover that sum only—the Court ordered the exceptions to be heard at the General Term in the first instance, the judgment to be in the meantime suspended.

G. Dean, for defendants.

I. The same question arises in this case that was argued in *Holbrook v. Basset and others*, as to the validity of the transaction called the trust, of which the plaintiffs were the special Trustees, and the points urged in that case are here insisted upon. (*Ante*, p. 166.)

II. The indorsement on this note was restrictive, and passed no title to the note in suit.

III. The plaintiffs being Trustees of the Atlas Insurance Company, and having advanced no money on this note, can recover only the earned premium, if entitled to recover.

1. This was \$102.75.

2. The premium on the shipment by the "Reporter" cannot be charged against this note, because there is no data for calculating its amount.

3. Plaintiffs could have called on defendant for amount, or could have examined him as a witness. It is a clear case of "not proven."

IV. The Court erred in excluding the testimony in reference to the insolvency of the Atlas Insurance Company.

The complaint should now be dismissed, with costs.

W. Britton, for plaintiffs.

I. The motion to dismiss the complaint was properly denied; for,

1. Plaintiffs sue as Trustees of an express trust, and had a right to sue as such; for,

(a.) The indorsement, together with delivery by virtue of the trust agreement of January 15, transferred the note to the plaintiffs, for the purposes of the trust. The indorsement, whether restrictive or otherwise, gave the right to collect, and the agreement made plaintiffs the real parties in interest till they were paid the amount of their loan. (*Brouwer v. Hill*, 1 Sandf., 648.)

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(b.) The right, expressly given by the agreement, to sell does not exclude the right to collect. The latter right is incident to the note itself—to its very nature; and it cannot be presumed to have been the intention of the parties to divest the plaintiffs of the right implied by the very nature of the note itself, without an express declaration to that effect. The object evidently was to give the additional right to sell, &c., which, without express agreement, the plaintiffs could not have had. (*Wheeler v. Newbould*, 16 N. Y. R., 392.) The right to present for payment, and receive the money when due, it will hardly be contended, was not in plaintiffs, and this right is not expressly given. The right to collect and receive without suit would seem to imply the right to collect by suit. It is merely a mode of collection. "*Expressio unius exclusio alterius*," does not apply to such a case. (Smith's Com., 655.)

The sale of the note without the right to collect in the purchaser, would be an absurdity, and no right of collection would have been in the purchaser from plaintiffs, as such purchaser could have taken no rights which the plaintiffs did not have. Moreover, the indorsement in writing was made at the same time, and that is to be taken as part of the contract, and, clearly, authority to collect is given by its terms. (*Waldron v. Willard*, 17 N. Y. R., 467.)

2. There was no violation, on the part of the Company, of part 1, chapter 18, title 2, article 1, section 8 of the Revised Statutes; for,

(a.) That section is in conflict with the 12th section of the charter of the Atlantic Company, made a part of the charter of the Atlas, and the charter having been last enacted, the Revised Statutes must yield. (*Howland v. Myer*, 3 Comst., 293.)

(b.) But if that section of the Revised Statutes does apply, the resolution passed January 14, (appearing in minutes of 29th,) authorized the transaction.

(c.) If not authorized by the resolution, it is only invalid as against the Company, its Receiver, or judgment creditors; defendant is not in a position to set it up. (*Nelson v. Eaton*, 15 How. Pr. R., 305; *Tracy v. Talmage*, 4 Kern., 162; *Curtis v. Leavitt*, 15 N. Y. R., 242, 106, 107; *City Bank of Columbus v. Bruce*, 17 id., 515.)

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(d.) Moreover, the Company, by accepting the benefits of the transfer, ratified the act, which ratification, in its legal effect, is equivalent to previous authority. (*Curtis v. Leavitt*, 15 N. Y. R., 48-50; *Reuter v. Electric Tel. Co.*, 88 C. L. R., 841; *Palmer v. Yates*, 3 Sandf., 138.)

3. The transaction of January 15 was valid; for,

(a.) It was but a loan by the parties thereto, for whom Nelson & Sturges acted, to the Company, and taking collateral security thereto, which was clearly legal. (*Charter Atlas Co.*, § 12, "Atlantic;" *Barker v. Mechanics' Ins. Co.*, 3 Wend., 96; *Munn v. Commission Co.*, 15 Johns., 44; *Attorney-General v. Life Ins. Co.*, 9 Paige, 470; *Moss v. Oakley*, 2 Hill, 265; *Barry v. Mer. Ex. Co.*, 1 Sandf. Ch., 280; *Beers v. Phoenix Glass Co.*, 14 Barb., 858; *Curtis v. Leavitt*, 15 N. Y. R., 62-65; *King v. Merch. Ex. Co.*, 1 Seld., 547; *Furniss v. Gilchrist*, 1 Sandf., 53.)

(b.) If a trust by the Company, it was competent for the Company to make such a trust. (*Angell & Ames on Corp.*, § 241; *Curtis v. Leavitt*, 15 N. Y. R., 62-65; *De Ruyter v. St. Peters Church*, 3 Comst., 238; *Nelson & Sturges v. Eaton*, 15 How. Pr. R., 805; *Barry v. Merch. Ex. Co.*, 1 Sandf. Ch., 280; *Leavitt v. Blatchford*, 17 N. Y. R., 534, *et seq.*)

(c.) If not valid *in toto*, there is no invalidity in any portion under which plaintiffs claim. The maxim, "void in part, void *in toto*," is not, in general, law, and this is not an exceptional case. (*Curtis v. Leavitt*, 15 N. Y. R., 96, 97.)

II. The ruling by the Court, excluding the questions by defendant, was proper; for,

1. Whether the Company owed defendant for losses, on the day of trial, was wholly irrelevant. (*Furniss v. Gilchrist*, 1 Sandf., 53.)

2. The balance of the questions were put with a view to prove insolvency on the 15th day of January, 1856, when the trust agreement was made, and are summed up in the last. Whether the Company was solvent or not was wholly immaterial; for,

(a.) Part 1, chapter 18, title 2, article 1, section 9 of the Revised Statutes does not apply. This transfer was not "with the intent of giving a preference to any particular creditor, but was to secure a loan, made at the time, of money used in the regular and legitimate business of the Company. (*Curtis v. Leavitt*, 15 N. Y. R., 109, 139, 198; *Leavitt v. Blatchford*, 17 id., 525.)

(b.) If it does apply, defendant could take no advantage of it. Plaintiffs would be obliged to account to "its creditors, stockholders or trustees," and them only. Defendant is in no position to set it up.

(c.) At common law, the Company, whether insolvent or not, would have an undoubted right to pay any creditors whatever until declared insolvent or enjoined by a competent Court, or a right to transfer its assets, as collateral to a loan. (*Barry v. Mer. Ex. Co.*, 1 Sand. Ch., 280; *Curtis v. Leavitt*, 15 N. Y. R., 52-65.)

III. The judgment should be for plaintiffs for the full amount found by the jury; for,

1. It is clear that \$118.80 was earned and adjusted.

2. The premium on the risk taken by the Company on the 27th November, 1855, in the absence of any proof as to its amount, should be computed at the amount of the balance of the note; for,

(a.) It being clear that a risk was actually taken, it was the duty of the defendant to report such amount, which the Company could only know through him, and on failure to perform that duty it should be presumed most strongly against him.

(b.) It was competent for the defendant to have shown the amount of the premium at the trial, which was a fact within his exclusive knowledge, and his silence on the subject raises the presumption against him.

IV. Nor does the 7th section of the statute, "relating to moneyed corporations," defeat this action; for,

1. The section, if applicable to this Company at all, has no application to a transaction of this nature. The notes borrowed by the Company were not "effects" within the meaning of the statute; and if they were, no such consequence follows, as that this note, transferred by the Company as collateral to those loaned to it, and on which the Company received the money, which was applied to the payment of its just debts, becomes void in the hands of the plaintiffs. There is no failure of consideration, and no *malâ fides*.

2. But if it does apply, this defendant cannot set it up. The note has been used precisely for the purpose for which he gave it to the Company—to pay its just debts; it has been converted into money, which money has been so used. No equities are

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pretended, and defendant has been in no respect prejudiced. (*Aspinwall v. Meyer*, 2 Sandf., 180, 188; affirmed, 3 Comst., 290.)

8. The charter of the Company provides that "all the corporate powers of the Company shall be exercised by a Board of Trustees, and such clerks and agents and other persons as said Trustees may appoint from time to time." (Charter Atlantic, § 3.)

Nelson & Sturges were "such agents or other persons." (4 Duer, 1.)

The plaintiffs should have judgment on the verdict.

BY THE COURT—WOODRUFF, J. So far as the questions involved in this case were considered in *Holbrook v. Basset et al.*, now decided, the opinion of the Court in that case may be taken as our opinion in this. We there hold that the agreement, in pursuance of which the plaintiffs received a transfer of the note in question, is not void as a violation of the statute forbidding a transfer of effects for the use or benefit of a moneyed corporation, unless it be made to the corporation directly and by name; that the due transfer of collateral securities, valid in the hands of the Company, made to the plaintiffs in performance of that agreement, was good, and entitled the plaintiffs to collect the same; that a transfer of collateral security, made in good faith to secure a present loan to such a corporation, to be used, and in fact used, in due course of business, is not a transfer with intent to give a preference within the act (§ 9) forbidding transfers when insolvent with intent to give a preference to one creditor over another; that such transfer in the present case was not void for want of power in the Atlas Insurance Company to borrow the notes to secure the payment of which the transfer was made; and that the transfer was not void on the ground that it was not sufficiently authorized by the Board of Directors.

Other considerations, which were not suggested by the facts in the former case, are urged in this. In the present action, as in that, the note in suit was a valid, binding note, in the hands of the Atlas Insurance Company, subject only to the question whether any greater sum than the amount of the premiums for risks indorsed on the defendant's open policy could be collected by the Company thereon. In this case, moreover, I think it must be conceded that the plaintiffs took no better title than the Company

itself had, as they were themselves officers or trustees of the Company, and must be deemed to have had knowledge of the title of the Company to the note.

1. It is suggested that, as the agreement in pursuance of which the transfer was made gave the plaintiffs authority to sell the collateral securities, or any part thereof, at public or private sale, the plaintiffs had no authority to use them in any other manner, or attempt, by any other mode, to make them available for the purpose for which they were transferred, and that, therefore, they have no power to sue for and collect them; that the agreement having pointed out a mode in which those collateral securities may be appropriated so as to indemnify those who were secured thereby, there is, by construction, an implied exclusion of any other power or control over those securities.

We think this is doing violence to the evident intent and meaning of the agreement. The liability of the parties was to be fully secured by collateral securities placed in the hands of the plaintiffs. The deposit of promissory notes for such a purpose in its nature imports authority to receive payment thereof, if payment be offered, and to collect them if not voluntarily paid. Such authority and power is incident to the very nature of the transaction or implied in it. A power to sell such securities, however, is not implied in any such deposit: on the contrary, that no such power exists is settled. (*Brown v. Ward*, 3 Duer, 660; *Wheeler v. Newbould*, 5 id., 29, affirmed, 16 N. Y. R., 392.) Hence, for the more effectual and easy indemnity of the parties, an express power to sell was inserted in the agreement under consideration, not for the purpose of restricting or curtailing the authority of the plaintiffs, but of enlarging it—not for the purpose of making the hypothecation less advantageous, but of making it more effectual.

2. It is urged here that the indorsement upon the note in suit was such that it does not entitle the plaintiffs to sue; that they have acquired no title to the note by such an indorsement; that an order by the Atlas Insurance Company on the maker to pay to, for account of the Atlas Insurance Company, does not divest their title. It is quite clear, we think, that, before the adoption of our Code of Procedure, no such objection to a plaintiff's right to sue would have been seriously

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suggested. The holder is at liberty to insert his own name in the blank, and the legal title is thereby vested in him. Before the Code, any mere holder, if the form of indorsements on the note was such as to enable him to assert a legal title, could maintain an action on a negotiable note, and, notwithstanding he held it for collection merely for the account of another party who was the real owner, it was enough that the plaintiff showed a legal title. Mere possession, with the owner's consent to the collection, was often sufficient to enable him to maintain the action in his own name. What, then, is the substance of the present objection? The Code requires that every action be prosecuted in the name of the real party in interest, except that trustees of an express trust are still authorized to sue in their own names. The real nature and character of the transfer is to be gathered from the agreement in pursuance of which it was made; and that declares that the transfer is to the plaintiffs as trustees, to secure the payment of the notes lent by the various parties thereto. If, therefore, there had been no indorsement whatever upon the defendant's note, and it had been merely delivered to the plaintiffs in performance of that agreement, they would have acquired an equitable title to the note, and would, in equity, have been entitled to hold and to collect it for the purposes for which it was placed in their hands. The special indorsement put upon the note does not impair that title. It is an express order on the defendant to pay the plaintiffs the amount. Its further statement, that such payment is to be for account of the Atlas Insurance Company, is to be construed with reference to the purpose for which it was transferred to the plaintiffs, and in subordination to the agreement for such transfer already considered; and, in the light of the transaction between the Company and the parties to that agreement, the meaning of the indorsement is entirely consistent with the clear right of the plaintiffs, both as against the Company and the defendant, to have the note paid to them as ordered. Sundry parties had lent their notes to the Company under an agreement that they should be fully secured. The Company had agreed to pay those notes, and agreed to deposit, and did deposit, with the plaintiffs, the note in question, and others, to secure their performance of the agreement. Now, if the Company did not otherwise pay those borrowed notes, the

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collection of the note in suit, and its application to such payment by the plaintiffs, would be in exact conformity with the rights of the parties under the agreement; and yet, the payment of the note in suit to the plaintiffs would be, in a just sense, a payment to them for account of the Company, because the proceeds were to be immediately applied to discharge an express obligation of the Company. The payment, therefore, by the defendant was to be (whether so in terms expressed in the indorsement or not) a payment for account of the Company; but the Trustees were to make the collection as a security to those who had lent their notes, to the end that the proceeds, though applied for account of the Company, should be applied in a particular manner agreed upon, which should operate to relieve them of liability upon the lent notes.

In short, the indorsement expressed no more than may truthfully be expressed whenever the payee of a note indorses it as a security for the payment of his own debt to another person. He appoints the payment to such other person, but for his own account, because it is both the right and duty of the indorsee to apply the proceeds directly and immediately to the discharge of his indebtedness. So a lien may be created upon promissory notes and bills of exchange deposited for collection, in such manner that although every note or bill may be made payable and may be paid "for account of" the depositor, still that lien may entitle the Bank to require the payment, and make the application of the moneys received for account of the depositor, so as to discharge the lien. The plaintiffs were created Trustees for the very purpose of carrying into effect the arrangement which could not otherwise be conveniently managed, by reason of the number of parties interested.

We are clear not only that the form of indorsement presents no obstacle to the recovery herein, but that it is not inapt to express the relation of the parties to the subject, in entire consistency with the trust vested in the plaintiffs, to be executed for the benefit of all the parties.

3. It is claimed that the whole consideration of the note was not earned, and therefore the note was without consideration. The jury found specially that the note was given as and for the premium upon an open policy of insurance. This, then, is con-

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sideration enough to sustain the note. So long as the Company was able and willing to insure according to the terms of the policy, the defendant could not demand a return of his note without making a surrender of his policy. But, conceding that the plaintiffs are in no better position than the Company itself were in this respect, and also that the maker of a note for the premium, upon an open policy, may lawfully refuse to pay such proportion thereof as by the indorsements on his policy appears not to have been used, (*Elwell v. Crocker*, 4 Bosw., 22,) still, in this case, the defendant fails to show that he is not liable for the full amount. So far as risks have been actually assumed, and indorsed upon his policy, the defendant is liable, and would be liable if the Company were plaintiff. The jury find that the amount of \$118.80 is due for risks indorsed and premiums earned, and that a further insurance is indorsed, which was made in all respects binding, at the rate of three and a half per cent upon a shipment, the amount of which he agreed to report to the Company.

Neither by report to the Company, nor by any proof on the trial, did he show that the premiums upon that risk did not more than equal the residue of the note, and we are clearly of opinion that the plaintiffs, under those circumstances, have a right to rely on the note itself as due in full. If the plaintiffs have not a right to collect the note, whether the consideration has been earned or not, (*vide, Central Bank of Brooklyn v. Lang*, 1 Bosw., 202,) we are clear that they showed enough, by producing the note, to put the defendant to show that it was without consideration, or to what extent the consideration was deficient, and that he not only failed to do this, but the proof warranted the presumption that the full amount was earned.

4. It only remains to notice the exceptions to the rejection of testimony. As to the inquiry whether anything was due from the Atlas Insurance Company to the defendant, at the time of the trial, for losses, it is obvious that no answer to that question could affect the right to recover. If a set-off could be permitted, it must have been set up in the pleadings. No such claim is made in the answer. Besides, the note in suit was transferred to secure parties actually advancing their notes upon the faith and credit of that transfer. No set-off arising after that transfer could affect them or the right of the plaintiffs to collect the full

amount of the note. It is not by this disposition of the exception intended to admit by implication that any set-off could have been allowed to the defendant, if pleaded, whensoever it accrued to him, the plaintiffs having received the note before its maturity, and to secure the parties who, at the time, advanced their notes, as already stated.

The other exception arises on the exclusion of evidence designed to show that the Company was insolvent when the agreement was made, in pursuance of which the note was transferred to the plaintiffs. Such proof would not invalidate the transfer. No statute and no rule of law forbids a moneyed corporation to transfer a note merely because it is insolvent. If we understand the claim of the defendant's counsel, he does not insist that mere insolvency makes such a transfer invalid. The only provision which can be supposed to be material to the question, is the one already noticed as section 8 of the statute, forbidding a transfer with intent to give a preference to one creditor over another. Here the transfer was not for the purpose of giving any preference to anybody; it was to secure the repayment of a then present loan. The money was thereby raised and received by the Company. Such a transfer could not operate as a preference. The Company borrowed the money and secured its repayment, and that is all.

If it were material to inquire what use the Company made of the money so obtained, the proof is unqualified and uncontradicted that "it was used by the Company in its general business, the payment of losses and expenses." So that if it had been shown that in truth the Company was at that date insolvent, it could in no wise affect the validity of the transfer. So far from any preference being gained by the transfer of the notes under the agreement, the parties lending their notes thereby assumed a hazard of loss in the very transaction itself, without the chance of gain. It seems to us that discussion cannot make it more plain that such a transfer was not, and could not be, from its very nature, a transfer with intent to give a preference to one creditor over another. Until after the transfer, the parties were not creditors.

Had there been any claim that the money was raised and applied in order to pay favored creditors, and that the whole

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arrangement to raise money was entered into with that view, there might be some plausible foundation for insisting that it might be shown that the plaintiffs were parties to the scheme, and so the whole transfer was invalidated; but no such claim was made; no such purpose or design appeared at the trial, and if the state of the pleadings would admit of such proof, none such was proposed or offered.

The plaintiffs should have judgment upon the verdict for the amount of the note and interest.

Judgment for the plaintiff accordingly.

SCOTT, Plaintiff and Appellant, v. THE OCEAN BANK, Defendant and Respondent.

1. Where a person having an account with a Bank, and being at the time its creditor, remits to it a bill of exchange "for his credit," such person having prior thereto made remittances to the Bank and drawn drafts upon it, and, by arrangement between them, was to be allowed interest at the rate of four per cent on his average balances; such Bank does not by the mere receipt of such bill become the owner of it, in such sense that it can divest the remitter's title, by transferring it as security for a precedent debt.
2. Although, by making such a transfer of it, the Bank may be charged by the remitter for its amount, still he is at liberty to pursue it and recover its proceeds from any one to whom it has been paid, and to whom it was transferred by such Bank as mere security for a precedent debt.
3. Such a transferee is not a holder for value, within the commercial meaning of that phrase, so as to have a right to retain the proceeds against the true owner, notwithstanding it may have been taken without notice of any defect in the title of the Bank.

(Before HOFFMAN and PIERREPONT, J. J.)

Heard, May 2; decided, July 28, 1859.

THIS is an appeal by William D. Scott, the plaintiff, from a judgment in favor of the Ocean Bank in the city of New York, the defendant, rendered on a trial had on the 21st of June, 1858, before Mr. Justice SLOSSON, without a jury.

The action was brought by the plaintiff as assignee of one James L. Lyell, to recover the proceeds of a bill of exchange

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remitted by the latter in August, 1857, to the Ohio Life Insurance & Trust Company at its office in New York, for the credit of said Lyell, and transferred by said Trust Company to the defendant, and by the latter collected.

The bill of exchange was received by said Company in New York on the 20th of August, 1857. It was presented for acceptance and accepted the same day. It was dated August 17, 1857, was drawn by the "Bank of British North America," for \$2,000 payable at three days' sight "to the order of E. Ludlow, Cashier," and was directed "to Messrs. R. Bell and J. H. Grain, New York," and was accepted by them August 20th, 1857, "payable at Merchants' Bank."

The bill of exchange was forwarded to said Company in a letter reading thus:

"BANK OF BRITISH NORTH AMERICA,
"London, C. W., 17th August, 1857.

"E. LUDLOW, Esq., Cashier:

"Dear Sir—I beg to inclose draft on Bell & Grain for \$2,000, for credit of James L. Lyell, Esq., in Detroit.

"Yours, &c.,

"G. TAYLOR, Manager."

The Judge found as facts:

"That the said James L. Lyell was a banker at Detroit, in the State of Michigan, and kept an account with the Ohio Life Insurance and Trust Company, at its office, in the city of New York; that from time to time, between June, 1857, and the 24th day of August, 1857, he made remittances to said Company, and drew drafts upon it; that he was a large depositor with said Company, of moneys and bills, and that there was an arrangement between him and said Company, that he should be allowed interest, at the rate of four per cent per annum, on his average balances.

"That on the said 24th day of August, the said Company failed and suspended payment; that on said last mentioned day, the said Lyell had standing to his credit on the books of said Company, exclusive of the bill of exchange mentioned in the complaint, a cash balance of \$108,483.56.

"That on the 20th day of August, 1857, the said Company, in the usual course of business, received for account of said Lyell,

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the draft set forth in the complaint, which draft was remitted directly to said Company, by order of said Lyell, in the letter accompanying the same, which was given in evidence; that said Lyell had been in the habit of remitting to said Company, in this way; that on the 20th day of August, said draft was presented by said Company to the drawees, for acceptance, and by them accepted and returned to said Company, in whose possession it remained, and was held until said 24th day of August; that it was known to some of the officers of said defendant the day before its failure, that said Company would probably fail; and that some of the officers of the defendant were invited to be present, and negotiations were had to which they were privy, to see if said Company could be saved from failing.

"That on the morning of said 24th day of August, when said Company failed, but before its failure was actually announced, the President of said defendant went to said Company, and received from it a batch of securities, to secure the indebtedness of said Company to the defendant, and among them the draft set forth in the complaint; that the defendant neither advanced nor paid any new consideration on receipt of said draft, but the same was taken as security for an antecedent indebtedness; that defendant received the proceeds of said draft at maturity; that said Lyell was not credited with said draft by said Company, before it was passed to the defendant.

"That said Lyell, on the 24th day of December, 1857, duly assigned to the plaintiff all his claim and demand against the defendant for or on account of said draft, or the proceeds thereof, as set forth in the complaint.

"That after said draft had been collected by the defendant, said Lyell applied to the Company, and ascertained the facts in relation thereto.

"That after the said assignment to the plaintiff, and before suit brought, the plaintiff made a demand on the defendant for the proceeds of this draft; that this action was commenced on the 5th day of January, 1858; that the President of the defendant did not know, on the morning of the 24th of August, that said Company would fail; that its officers stated to him that they expected to go through, and he believed it; that the proceeds of said draft were applied by the defendant, by giving said Company credit

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in account therefor, in extinguishment of so much of the defendant's account against said Company, which was more than the amount of such proceeds.

"That after the stoppage of said Company in New York, it continued to do business at Cincinnati, Ohio; and that said Lyell drew his drafts on said Company, from time to time, during the month of September, 1857, to the amount of \$98,236.84.

"That the defendant, when it received said draft, knew nothing of Lyell's claim to it; and that it first heard of such claim through the demand of his assignee, the plaintiff, in December, 1857.

"That after the commencement of this action, but without the knowledge of said Lyell or the plaintiff, the book-keeper of the assignees of said Company credited the said Lyell, in his account therewith, with the proceeds of said draft."

The Judge held:

"*First.* That, as matter of law, the ordinary relation of debtor and creditor existed between the Ohio Life Insurance and Trust Company and Lyell, in respect of the account of said Lyell with said Company, including the \$2,000 draft in question; that said Lyell was entitled to have a credit in said account for the amount of the draft, on the receipt thereof by said Company; and that said draft and the proceeds thereof, received thereon, became, as between it and Lyell, the property of the Company, and could be used by it as its other funds were used. The Ohio Life Insurance and Trust Company was entitled, and had a right, to pass said draft to the defendant in part payment, or as collateral security for its own indebtedness to the defendant; and that neither the said Lyell nor the plaintiff had any right to pursue or reclaim the proceeds of said draft in the hands of the defendant; and that said defendant was entitled to retain the same.

"*Second.* That, upon the facts above found, the said plaintiff was not entitled to maintain his action; and that the defendant was entitled to judgment, dismissing the complaint with costs."

The plaintiff duly excepted to each of said conclusions of law.

Judgment having been entered upon the said decision, the plaintiff appealed from it to the General Term.

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F. F. Marbury, for appellant.

I. There was no agreement, and no understanding or mode of dealing, between Lyell and the Ohio Life Insurance and Trust Company, by which he had a right to draw, and the Company was bound to accept, otherwise than upon cash to his credit.

In this case, Lyell never drew, nor was entitled to draw, by arrangement, except upon his own proper moneys on deposit.

It appears distinctly in this case how the account of Lyell with the Ohio Life Insurance and Trust Company stood on the 24th August, 1857, namely, he had, on that day, a balance to his credit of over \$100,000 in cash, and, certainly, had no occasion, then or at any other time, so far as appears, to seek or require any favor or assistance from the Company.

This, unlike the case of *Clark v. The Merchants' Bank*, (1 Sand. S. C., 498, and 2 Comst., 380,) is a case of a customer with a banker. The parties are not exchange brokers, receiving funds, and making drafts upon each other, with the right, on the part of each, to have credit for paper remitted, and to draw thereon, whether collected or not. Nothing of the kind existed in this case. The Ohio Life Insurance and Trust Company was simply the agent and depositary of Lyell, to receive his moneys and pay his drafts thereon, when requested.

In this case, there is not a particle of evidence to indicate that the acceptance of Bell & Grain was to be passed to Lyell's credit until collected. It was not so passed. The right of the Ohio Life Insurance and Trust Company, as Lyell's agent, to receive payment at maturity, gave it no right to transfer the acceptance before maturity, on account of a precedent debt of its own.

II. An examination of the note 3 to section 228 of Story's Agency, and of the cases cited therein, to which Justice GARDNER refers, will demonstrate, beyond any peradventure, that if the facts in *Clark v. The Merchants' Bank* had been like those in the present case, the Court of Appeals would never have reversed the judgment of this Court.

To those cases may be added the recent case of *ex parte Barkworth in re Harrison*, (4 Jurist, N. S., 547,) where the whole subject is discussed with great clearness. (See, also, *Lawrence v. Stonington Bank*, 6 Conn., 521; *McBride v. Farmers' Bank of Salem*,

25 Barb., 657; *Van Ameer v. The Bank of Troy*, 8 id., 312; *Haynes v. Foster*, 2 Crompt. & Mees., 287; 1 Arch. N. P., 194.)

III. The defendant can make no pretension to the character of being a *bona fide* holder for value, without notice. (*Youngs v. Lee*, 2 Kern., 555.)

If the Ohio Life Insurance and Trust Company would not have been justifiable in withholding this acceptance from Lyell, if he had demanded it specifically on the 24th day of August, 1857, as it clearly would not have been, the defendant having no better title than the Trust Company, cannot retain the proceeds against the true owner. The judgment should be reversed, and judgment rendered for the plaintiff for the amount claimed, with interest and costs.

E. L. Fancher, for respondent.

I. The draft in question was not sent forward "for collection merely," but was intended as a deposit for the credit of Lyell.

1. Lyell was a general creditor of the Ohio Life Insurance and Trust Company. When that Company failed, he had no right to withdraw any specific assets, and did not assume to have. He had a general deposit with the Company, precisely as any dealer has with a Bank.

2. When he deposited, by cash or receivables, it became the property of the Bank, and the dealer Lyell became the creditor of the Bank for the amount. Lyell had the right to check for this money at any time, and exercised that right until long after this transaction.

II. Lyell was a dealer with, and depositor in, the Trust Company: when he remitted or delivered to the Company his receivables, they were treated as cash, and he had credit therefor. The Trust Company were not to remit the proceeds of the bill to Lyell, but to give him credit for them. He drew, not for the specific proceeds, but generally, treating the Company as his debtor.

III. This relation of debtor and creditor had long been recognized, and is unequivocally admitted. The allowance of interest on his deposits shows this, and establishes the right of the Company to the money. (*Clark v. Merchants' Bank*, 2 Comst., 380; *Chapman v. White*, 2 Seld., 417.)

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IV. Lyell was a creditor of the Trust Company for a large amount, and, as such, drew his checks or drafts on his general balance for nearly a month after this transaction.

Large payments were made on account of that indebtedness, as well on account of this draft and its proceeds as of any other deposit.

To allow the plaintiff, now, to recover the specific proceeds of this draft, or their equivalent, would be unjust, and would, in effect, make a new contract for the parties. *Non constat* all the other indebtedness stands in the same category, and other plaintiffs may spring up with assignments of similar claims.

V. Lyell never had the legal title to this draft. It was a voluntary deposit in the Bank of British North America for the credit of the Trust Company.

Even if it had been a draft forwarded by Lyell for collection only, it has been well decided that the Ohio Life Insurance and Trust Company are the agents of the Bank of British North America, and not the sub-agents of Lyell; and, therefore, not answerable to him. (*Allen v. Merchants' Bank of New York*, 22 Wend., 228; *Montgomery County Bank v. Albany City Bank*, 3 Seld., 459; *Commercial Bank of Pennsylvania v. Union Bank of New York*, 1 Kern., 203.)

But here the ownership was in the Trust Company, from the time that Lyell deposited the money. This money was, in effect, deposited in the Trust Company at the date of the draft, and he could not, after that, control it: certainly not after it reached the Trust Company.

VI. The Ocean Bank are holders for value. The Bank took it on account of a debt. If this draft had been supposed not to belong to the Trust Company, the Ocean Bank could have applied for another in its place. And a debt, when thus paid, *pro tanto*, by a bill or note, is a sufficient consideration. (*Bank of Salina v. Babcock*, 21 Wend., 499.)

The claim of the Bank is, therefore, more meritorious than the claim of the plaintiff. The judgment of the Special Term was correct, and should be affirmed, with costs.

BY THE COURT—HOFFMAN, J. The defendants cannot, in my opinion, under the decision in *Stalker v. McDonald*, (6 Hill,

96,) even as modified or explained in *White v. The Springfield Bank*, (3 Sandf. Sup. C. R., 222,) be treated as purchasers for value, so as to hold the acceptance or its proceeds against a real owner, who had never parted with his property in it. The defendants did not, when they took the acceptance, by any unequivocal act, treat it as extinguishing so much of the debt of the Company. They only credited the Company in general account, upon a previous indebtedness, after they had collected the amount. It was the proceeds which they so applied. (*Youngs v. Lee*, 2 Kern., 555.)

The case, therefore, appears to depend upon the point chiefly contested by counsel, viz.: Whether the Ohio Trust Company was not, in point of law, the real owner of the draft, and as such transferred a good title to the defendants. The first conclusion of law of the learned Judge states the point, and contains the proposition that the draft was actually the property of such Company.

On the 20th of August the draft was received; on the same day it was presented and accepted. It was never passed to the credit of Lyell until after this action was commenced.

On the 24th of August it was delivered to the defendants, and on the 26th was paid.

This dealing with the acceptance by the Company may have made it responsible to Lyell for the amount on the 24th of August, as absolutely as if they had received and credited that amount; yet it does not necessarily follow that the right to pursue the acceptance is lost by a right to recover from the Company.

Again, it is very difficult to conclude from the facts in this case, that the Company was bound to credit even an acceptance, in account with Lyell, so as to require it to honor his drafts before its payment. "He had been in the habit of remitting in this way." "He was a large depositor with the Company of money and bills." "This draft was sent to the Company in the usual course of business." "He was to be allowed interest at four per cent on his average balances." He had a cash balance to his credit on the 24th of August of over \$108,000. He proceeds to draw upon this during the month of September, to

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the amount of over \$98,000, and his drafts are paid at the office in Cincinnati.

I find it difficult to concur with the learned Judge, "that Lyell was entitled to have a credit in account for this draft on its receipt by the Company." The habit of remitting and depositing money and bills does not necessarily imply this. The habit of business is as consistent with meeting drafts on actual funds, as upon acceptances or securities unpaid; and there is no previous established habit proven to define its nature. The allowance of interest would naturally be on actual cash balances only.

In the decision of *Clark v. The Merchants' Bank*, (2 Comst., 380,) no fact was considered as of higher importance than this: "Whether the draft there in question was to be credited to the plaintiff, when received by Smith & Company, whether collected or not?"

When that draft was sent it was accompanied with notes to the amount of \$2,496.08 expressly for collection, and with \$17,975.62 (including the \$7,000 draft in question) in notes, bank bills, &c., per account No. 1. The amount was \$20,471.70, and with the remittances, advice was given of drafts on the fund for \$20,832.26. "As the mode of dealing had been continued for years, and was perfectly understood by all parties, the plaintiffs had a right to draw against the funds remitted, and Smith & Co. were bound to accept. The whole fund was, by the course of dealing, treated as cash."

Again, it is observed by the Court "that the case is much stronger than that of a customer with a banker. The parties were exchange brokers, mutual correspondents, receiving funds for and making drafts upon each other. Unquestionably it was their intention to keep each other in funds to answer the bills drawn by them respectively. But in case the paper transmitted should be unavailable, a principal object of the arrangement was to prevent these drafts being returned dishonored, by making it the duty of the correspondent to accept and pay notwithstanding." No such mutual account and dealing is found in the present case.

The authorities cited by Justice SANDFORD, when *Clark v. The Merchants' Bank* was in this Court, (1 Sandf., 498,) show how clearly the rule is that the property in notes or bills, transmitted to an agent or banker, vests in him only when he has

become absolutely responsible for the amount to his customer. Unconditional liability and ownership become correlative. How the former is made out, is matter of evidence; but the principle and good sense of the law seems to be that an owner does not lose his property, the possession of which is committed to another, unless he has chosen to constitute that other his debtor for it, and that other has assumed the liability, and both facts are satisfactorily established, or unless an authority is sufficiently established under which the holder was entitled to use the security for his own business purposes, and thus confer a valid title upon another, even for an antecedent debt.

In *ex parte Barkworth in re Harrison*, (4 Jurist, N. S., 547,) the question was as to short bills, and the Court say that the point was whether there had been any agreement between the customer and the bankrupt, that the bills should be the absolute property of the bankers. The banker was in the habit of crediting unpaid bills transmitted to him by the customer directly as cash, not carrying them short. But there was no evidence that the customer knew of this or drew upon the fund on the ground of such credit. Upon the bankruptcy of the banker, there were bills in his hands of the customer not due, and a cash balance also in his favor. It was held that the customer had a right to the bills as against the assignees. There was not evidence to show that the bills constituted an immediate debt from the banker to the customer.

The present case does not in my opinion fall within the liberal rule of *The Bank of the Metropolis v. The New England Bank*, (1 How. U. S. R., 240; 6 id., 212,) but is governed by the principle of the case of *Lawrence v. The Stonington Bank*. (6 Conn. R., 521.)

The Ohio Company did not so place themselves in the situation of an absolute debtor to Lyell, as to make themselves owners of the draft. There is no evidence to prove that Lyell had given any authority for the use of his securities transmitted to the Company for their own purposes.

There is no course of business or dealing proven from which such a power can be deduced. The Company took the draft for collection merely. It was Lyell's property in their hands when they transferred it to the defendants, and the defendants, upon

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the facts as to such transfer, acquired no better title than the Company possessed.

We think that the judgment must be reversed and a new trial had, with costs to abide the event.

Ordered accordingly.

DIBBLE et al., Plaintiffs and Respondents, v. CORBETT et al.,
Defendants and Appellants.

1. Where a person contracts to purchase goods, which, at the time, are on board of a vessel at sea, and expected to arrive, it is his duty to receive such goods within a reasonable time after notice of their arrival, and a tender of the goods at the place designated by him for the delivery of them.
2. Where such purchaser refuses to accept a delivery within a reasonable time, he is liable to the vendor for the damages necessarily caused by such delay.
3. Although the contract be made in such form that the title to the property does not pass until the goods are delivered, yet the contract being valid and obligatory, and the purchaser having accepted the goods under it, it is no answer to the claim for damages for delaying an unreasonable time to receive them, that the title of the purchaser does not become vested until the goods are delivered and accepted.

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 9; decided, July 28, 1859.

THIS is an appeal by John A. Corbett and Andrew Johnston, who are the defendants, and compose the firm of Corbett & Co., from a judgment in favor of Calvin B. Dibble and Jonathan E. Bunce, who are the plaintiffs, and compose the firm of Dibble & Bunce. The action was commenced in October, 1856, and was tried before Mr. Justice WOODRUFF and a jury, on the 28th of May, 1858. The plaintiffs recovered a verdict, and from the judgment entered on that verdict, the present appeal is taken.

The complaint states that on the 2d of August, 1856, the plaintiffs bargained and sold to the defendants, who purchased of the plaintiffs certain goods then on board of the schooner F. A. Godwin, which goods the plaintiffs agreed to deliver, and

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the defendants to accept, on the arrival of the schooner at the port of New York; that she arrived there on the 5th of said August; that the plaintiffs were then ready and offered to deliver the goods, and requested the defendants to receive them; that they neglected and refused to receive them until the 15th of August, in consequence of which neglect and refusal the plaintiffs were obliged to and did stow and keep the goods on board of said schooner, at a great loss and damage, whereby they sustained loss and damage to the amount of \$200; and prays judgment for that sum, with interest from the 15th of August, 1856.

The answer denies that the plaintiffs agreed to deliver, and the defendants to receive the goods, on the arrival of said schooner, but avers a readiness to receive them on such arrival, and that the delay in receiving them arose from the fact that the defendants also purchased of the plaintiffs other goods on board of another schooner, viz., the *Ocean Wave*; that the goods could not be received from both schooners at the same time, and by permission of the plaintiffs they first received those on board of the *Ocean Wave*; that the delay was not unnecessary; and that as soon as the goods were received, the defendants paid and satisfied the plaintiffs therefor.

Before any evidence was given, the defendants moved a dismissal of the complaint, on the grounds, (1.) that the action is for or in the nature of demurrage, and cannot be sustained, except upon a contract expressed or implied, and that no such contract is stated in the complaint; (2.) that such an action will only lie in favor of the owners of a vessel, and against the freighter or consignee, and that the complaint does not state that the plaintiffs are owners, or the defendants freighters or consignees; (3.) that the complaint does not show that the plaintiffs were compelled to pay demurrage, which the defendants should refund; (4.) that the ultimate acceptance of the goods by the defendants, and receipt by the plaintiffs of payment therefor, is an answer to any claim for damages from delay in receiving the goods. The Judge refused to dismiss the complaint, holding that it was good in substance, and the defendants excepted.

J. B. Bunce, one of the plaintiffs, testified, without objection, that they "sold a quantity of rosin to Corbett & Co., to arrive,

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and to be delivered afloat on the arrival of the vessel. Edward C. Cartwright effected the sale as broker."

The plaintiffs offered to read the broker's note of the contract of sale. The defendants admitted its due execution, but objected to its being read, "on the ground that there is nothing in the complaint to sustain it." The objection was overruled, and they excepted. It was then read in evidence, viz.:

"NEW YORK, August 2d, 1856.

"Messrs. DIBBLE & BUNCE:

"Sold for your account, to Messrs. Corbett & Co., 1,265 barrels common rosin, at \$1.55 per 310 lbs., delivered afloat, and $\frac{1}{2}$ weighing 1 c. per brl., to arrive per schooner F. A. Godwin."

"EDWARD C. CARTWRIGHT,

"Broker in Naval Stores and General Merchandise.

"Cash Brokerage, 1 c. per brl."

He further testified that the schooner F. A. Godwin arrived on the 5th of August, 1856; that the defendants were notified of it on the same day, and instructed the plaintiffs to send her alongside of the ship Valleyfield, at Pier 50, East River, which was done, and that the discharge of the schooner was completed on the 15th of August; that the plaintiffs were ready, on the morning of the 6th, to discharge her, and kept men on hand for the purpose every day, until she was discharged; that the discharging was commenced about the 12th of August.

The plaintiffs offered in evidence copies of three letters written by them to the defendants. The defendants admitted due notice to produce the originals, but objected to copies being read "as not being admissible under the complaint." The objection was overruled, they excepted, and the copies were read in evidence.

That of the 6th of August states that the "Schooner Ocean Wave is lying idle alongside ship. * * The schooner cannot be thus detained without demurrage. Schooner F. A. Godwin is also waiting. We look to you for all damages we sustain by this delay of the two schooners."

That of the 7th of August states, that "The schooners F. A. Godwin and Ocean Wave are lying idle alongside of ship

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to which they were sent. We are liable for demurrage on each of thirty dollars per day, which please note, as we look to you for all damages we sustain."

That of the 9th of August states, that "Schooner F. A. Godwin continues to lie alongside ship where sent, at Pier 50, idle, and on demurrage, while the Valleyfield is taking in some other freight."

Each of these notes was delivered to the defendants, on the day of its date.

The defendants objected to evidence of a "reasonable time for discharging the rosin from the schooner," "on the ground that the complaint does not state what is a reasonable time, nor that the defendants delayed the vessel unreasonably," and excepted to the decision admitting it.

Q. "Was the keeping of the rosin, during the period of delay, attended with any expense?"

Objected to by the defendants on the ground that there is no allegation in the complaint to warrant any such evidence. Objection overruled and exception taken.

A. "It was attended with expense." Q. "What was the expense?" A. "The actual expense was \$25 a day." Q. "What for?" A. "The hire of the vessel and storing of the goods, the wages of the men that we sent up there to discharge the rosin, and the captain, and the hiring of the vessel."

The witness also testified that "besides the F. A. Godwin there was the Ocean Wave; * * this is the sale note of the Ocean Wave. The Ocean Wave unloaded first; they were both to be delivered alongside of whatever vessel the defendants designated."

The sale note of the Ocean Wave was read in evidence, viz.:

"NEW YORK, August 2d, 1856.

"Messrs. DIBBLE & BUNCE:

"Sold on your account to Messrs. Corbitt & Co., 1085 brls. common rosin @ \$1.55 per 310 lbs. delivered and $\frac{1}{4}$ weighing 1 c. per brl. to arrive per schooner Ocean Wave.

"EDWARD C. CARTWRIGHT,

"Broker in Naval Stores and General Merchandise.

"Cash Brokerage, 1 c."

This and other witnesses were examined upon the questions, when each schooner began to be discharged; the time necessary and actually occupied for the purpose; and whether both schooners could have been discharged at the same time; and as to the *per diem* expenses from the delay.

When the plaintiffs rested, the defendants moved to dismiss the complaint, because, (1.) the proof differs materially from the allegations in the complaint; (2.) the plaintiffs have not proved they owned the schooner, and that the defendants freighted or chartered it; (3.) nor that there was unreasonable delay after the schooner came alongside the ship; (4.) the contract does not authorize a recovery for the damages claimed; (5.) the plaintiffs have not shown payment by them of the amount sought to be recovered. The motion was denied and the defendants excepted.

The defendants produced receipts of the plaintiffs for payment of whole amount "of bill of rosin," for the rosin covered by both contracts, the last receipt being dated August 28th, 1856. The evidence tended to show that the discharging of the Ocean Wave was commenced on the 6th and completed on the 11th of August, and that the defendants urged the captain of the Valley-field to receive the cargo of the schooners as fast as he could, and that the plaintiffs as soon as the schooners were discharged presented to the defendants a bill for the damages claimed.

When the testimony was closed, the defendants requested the Judge to charge "that no demurrage can be recovered by the plaintiffs in this action, nor any damages in the nature of demurrage."

He charged (among other things) "that it was the duty of the defendants, under these contracts, to be in readiness to receive the goods, upon notice that the vessels had arrived in port, and of plaintiffs' readiness to deliver, and if the defendants desired the delivery of the goods alongside any particular vessel, then it was their duty, on receiving notice of the arrival, to designate the place to which the schooner should be taken for the purpose of the discharge.

"That it was the duty of the plaintiffs to notify the defendants, that the schooner was ready to deliver the goods, and to be in readiness to discharge them from one vessel to the other.

"That it was the defendants duty to attend to the reception of the goods, and to receive them within a reasonable time.

"That it does not excuse the defendants for delay in receiving the goods, that their vessel was not in readiness to receive them. If the defendants designated the Valleyfield as the ship to receive the goods, and that vessel was not ready, it was their duty to find another, or receive the goods at some other place.

"That the plaintiffs should not be compelled to wait beyond a reasonable time, because the defendants' vessel was not in readiness to receive the goods; that it was not the plaintiffs' fault that the defendants' vessel was not in readiness, but the defendants' misfortune only.

"And that the defendants are responsible for whatever damages the plaintiffs necessarily sustained, by reason of an unreasonable delay of the defendants in receiving the goods.

"That if two cargoes come in at the same time, the defendants have a right to proceed and discharge one vessel first, and then to discharge the other. This is reasonable.

"That the defendants' counsel are right in saying, that it is the plaintiffs' duty to present their vessels in readiness to discharge the cargo.

"That the rule of damages, in this case, does not depend upon the charter party of the schooner, but the plaintiffs are to have simply the necessary expenses of taking care of the property, and keeping it during the period of unreasonable delay, and nothing more can be recovered.

"The necessary expenses incurred during the period of the delay, beyond a reasonable time to receive the goods, is the rule of damages, and it is not necessary for the plaintiffs to show that the money has been actually paid by the plaintiffs before suit, but it is sufficient to show that the expenses have been necessarily incurred.

"To each and every of which propositions of said charge, the said defendants' counsel did then and there, separately and specifically, except.

"And the Judge further charged the jury—

"That the plaintiffs cannot recover demurrage; they were not bound to keep the schooner here, and the defendants cannot be

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affected by any contract between the plaintiffs and the owners of the schooner, entitling such owners to demurrage."

The jury, under said charge, retired, and afterwards returned a verdict for the plaintiffs of \$196.85.

The defendants moved, on a Case containing the exceptions, for a new trial, and the motion was denied. Judgment having been entered on the verdict, the defendants appealed from it to the General Term.

H. Z. Hayner, for defendants, (appellants.)

I. On the trial, the Judge in his charge in terms met the motion for a dismissal of the complaint, (but had before disregarded the rule in the admission of testimony,) in the following particulars, viz.:

1. That the action for demurrage, or in the nature of demurrage, could not be sustained except upon a contract, express or implied. (Abb. on Ship., 304; *Horn v. Bensusan*, 9 Carr. & P., 709.)

2. That an action for demurrage can only be sustained by the owner of the vessel. (*Clendaniel v. Tuckerman*, 17 Barb., 184; *Evans v. Forster*, 1 Barn. & Ad., 118; *Brouncker v. Scott*, 4 Taun. R., 1.)

3. The action for demurrage will only lie against the freighter or consignee, and only for unreasonable delay occasioned by defendants, and properly alleged in the complaint. (Abb. on Ship., 304; *Horn v. Bensusan*, 9 Carr. & P., 709.)

II. The Judge, before his charge, had admitted evidence, under exceptions, in direct conflict with his charge.

III. The defendants agreeing to purchase certain goods (the rosin) of plaintiffs, to arrive, and pay therefor on the delivery thereof, the plaintiffs, by delivering the same, and accepting the pay therefor, waived and precluded themselves from all claim for damage for the delay or neglect on the part of the defendants in accepting the delivery thereof, when first requested by plaintiffs.

IV. The plaintiffs did not sustain the relation of bailees to bailors to the defendants, whereby they would be enabled to sustain this action against the defendants.

V. The charge of the Judge was erroneous—as he assumed that the plaintiffs held the relation of common carriers to the defendants as owners or consignees of the goods.

VI. The sale and purchase were not completed, nor did the title of goods pass from the plaintiffs to the defendants until the delivery of the same; at any time before that, it was only an agreement to sell and deliver the goods on the part of the plaintiffs, and an agreement on the part of the defendants to accept them, and pay therefor on delivery. (*Chapman v. Lathrop*, 6 Cow., 110; *Clarkson v. Carter*, 3 id., 84; *Leven v. Smith*, 1 Denio, 571; *Conway v. Bush*, 4 Barb., 564.)

VII. The weight of the barrels was also to be ascertained before delivery, for each of the parties agreed to pay one-half of the expense of weighing. (*Rapelye v. Mackie*, 6 Cow., 250; *Outwater v. Dodge*, 7 id., 85; *Fitch v. Beach*, 15 Wend., 221; *Russell v. Nicoll*, 3 id., 112.)

VIII. The plaintiffs still owning the goods, the title thereto not having passed to the defendants, have no right to charge for the expense of storing or keeping their own goods, to the defendants.

1. By subsequently delivering the goods the plaintiffs waive the right of considering the offer to deliver, as the time of delivery.

By that act the plaintiffs waived the right to consider the date of offer as the time for the completion of the contract.

2. The charges or expense of storing or keeping the goods between the time of the offer to deliver and the actual delivery were also waived.

3. Story on Sales, (§ 394,) has the dictum, “if between the sale and delivery, the vendor be put to charge in preserving and harboring the goods, the vendee is bound to reimburse him therefor.” (Story on Sales, § 394.)

4. Also, section 404: “It is the duty of the vendee to take the goods within a reasonable time, or he will be liable to the vendor for warehouse rent and other expenses growing out of the custody of them, or even to an action for not removing them in case the seller is prejudiced by his delay.” (Story on Sales, § 404.)

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The authorities he quoted for the doctrine are: Brown on Sales, (§§ 497, 498,) *Greaves v. Ashlin*. (3 Camp. R., 426.)

5. The rule is correct with this limitation, that it applies only to perfected sales, and where the title to the goods has passed from the vendor to the vendee, and the possession thereof still remaining in the hands of the vendor. Such were the following cases: *Greaves v. Ashlin*, (3 Camp., 426,) *Sands v. Taylor*, (5 Johns. R., 395,) *Maclean v. Dunn*, (4 Bing. R., 722,) *S. C.*, (1 M. & P., 761.)

6. The doctrine is laid down in Parsons on Contracts, as follows, viz.:

"That the vendee is bound to receive and pay for the thing sold at the time and place expressed or implied in the contract of sale, and to pay all charges for keeping it after sale and delivery." (1 Parsons on Con., 447.)

7. If, after the title passes to the vendee, the goods are left in the hands or possession of the vendor, he then no longer holds them under the contract of sale as vendor, but as bailee. And all the duties and liabilities of bailor forthwith attach to the vendee.

8. But, before the title passes, no such consequence can follow from the possession of the goods by the vendor.

9. In the case of *Cole v. Kerr*, (20 Vt. R., 21,) it was held there was no implied contract, upon the sale of personal property, that the vendee shall pay the vendor for any services in relation to the property previous to the completion of the sale by delivery. (*Cole v. Kerr*, 20 Vt. R., 21.)

10. Why not as well for sacking the wool, as for storing the goods?

I am at a loss to discover a reason for the difference.

11. The Judge's charge was therefore clearly erroneous.

IX. If the plaintiffs, under the law and evidence of the case, were entitled to a verdict, the damages are clearly excessive.

Wm. E. Curtis, for plaintiffs, (respondents.)

The action is brought to recover for the expenses growing out of the custody of certain goods which the defendants, the vendees, neglected to take until after the expiration of the time within which they were to be taken.

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The defendants, for answer, set up that the plaintiffs consented to the delay, and also that there was no delay. The jury found for the plaintiffs a verdict for \$196.85.

I. The right of the plaintiffs to recover in an action of this nature is well settled. (Story on Sales, §§ 394, 404, 436.)

"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge warehouse room, or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract." (*Greaves v. Ashlin*, 3 Camp., 427.)

II. The evidence clearly shows a delay beyond a reasonable time to receive the goods, and that such delay caused necessary expenses to be incurred by the plaintiff.

The evidence shows that the goods were kept waiting on board the schooner from August 5th to August 15th, being ten days, and all the witnesses agree that two or three days is a sufficient and reasonable time for their discharge. The judgment should be affirmed, with costs.

BY THE COURT—HOFFMAN, J. The contract between the parties clearly imported, that the defendants should be prepared promptly to take the rosin from the hands of the plaintiffs, upon their being apprised of the arrival of the schooner, and upon the plaintiffs following their directions as to the place of delivery, and using proper diligence in facilitating the discharge and reception of the goods.

Under the charge of the Judge, the jury have in effect found that the plaintiffs were faultless, and the defendants negligent.

It is perfectly settled that it is the duty of the vendee to take the goods within a reasonable time, or he will be liable to the vendor for warehouse rent and other expenses growing out of the custody of them, or even to an action for not removing them in case the seller is prejudiced by his delay. (Story on Sales, § 404.)

It is insisted by the learned counsel of the defendants, that this rule is only applicable when a sale is so perfected as that the property has passed to the vendee, and possession remains in the vendor.

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If it were necessary, in order to support the plaintiffs' claim and the verdict, that such a transfer of property should be made out, our impressions would be that the right of property did actually pass upon the arrival of the schooner, so that in England; under an act of bankruptcy, the goods would pass to assignees, they paying the price; and so that the defendants could sustain trover for them against others. The weighing of the rosin under this contract may have been as much intended to be done by the purchasers as by the sellers. (Ross on Venders, 32; Law L., vol. 12, p. 17, and cases; *Ward v. Shaw*, 7 Wend., 404.)

But whether this is so in all respects or not, when the defendants completed the purchase, took the rosin, and paid the price, they may be treated as purchasers and owners from the date of the contract which they acted under and fulfilled. When they began to unload and take the rosin about the 11th of August, the title then at least became vested in them as owners, and from the time of the contract. They could have recovered any advance of price beyond the amount to be given as fixed on that day. They claimed to be owners and got the property by virtue of this contract; and then by relation, for the purposes of this question at least, they must be treated as owners from its date.

Now if a buyer's neglect of this character does not entitle the seller to put an end to the contract, (3 Camp., 427,) he has no redress for the injury done him, and expenses incurred by him through the purchaser's fault, but by an action of this nature; and to hold that the subsequent performance of the bargain which he could not prevent, shall rob him of this redress, would be a conclusion as manifestly unjust as we think it is untenable.

There is nothing before us on which we can pass upon the question of an excess of damages.

The observations above made dispose of the motion to dismiss the complaint which was made before the plaintiffs had given evidence and was renewed upon his resting.

The copies of the plaintiffs' letters to the defendants upon the subject of the vessel's arrival, and urging a prompt discharge, were given in evidence, after an admission of a notice to produce the originals. The admission was excepted to. On what ground we are at a loss to understand. No point as to this admission is

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now made. To have set these letters out in the complaint would have been pleading matters of evidence.

The same remarks apply to the admission of the conversation of the witness with the defendants, upon the same subject of the discharge of the rosin.

The exceptions as to the inquiry, what would be a reasonable time for discharging the rosin, are clearly untenable. Those as to the expense of keeping the rosin and schooner are equally so.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM B. SCOTT *et al.*, Plaintiffs, v. JONATHAN T. JOHNSON, Defendant.

1. An Insurance Company which, by the terms of its charter, is authorized, for the better security of dealers, to receive notes for premiums in advance from those who intend to receive its policies, and to negotiate such notes for the purpose of paying claims or otherwise in the course of its business, has power to transfer such notes as security for the repayment of a loan of money made to the Company, and received and applied to the payment of losses, expenses, &c., in the ordinary conduct of its business.¹
2. When it is proved that it is the uniform practice of such a Company to transfer notes, negotiated in its business, by an indorsement in this form, "For the Company, A. B., President," such proof is *prima facie* evidence of authority in the President to indorse notes held by the Company, by way of transfer; and such indorsement is sufficient to confer the title on one who receives a note from the Company in good faith, and advances to them money thereon.
3. A person who lent money to such Company, in good faith, on the transfer to him, as collateral security, of subscription notes given for premiums in advance, amounting to over \$1,000, and without any notice that there had been no previous resolution of the Board of Directors authorizing the transfer, is entitled to recover thereon against the makers, although no such resolution had been passed.
4. Where there is no allegation in the answer under which usury between the Company in such case and the lender can be available as a defense, it is not error to reject evidence of the rate of interest charged on the loan. If

¹ *Holbrook v. Basset*, ante, p. 147.

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proof that the lender charged more than seven per cent per annum is not admissible to establish usury, it is not relevant for any purpose: it has no bearing on the question whether the plaintiff is a *bona fide* holder in any other aspect.

5. Whether, under a statute which forbids a corporation to interpose the defense of usury, a transaction, otherwise void for usury, is not entirely valid? and whether a third person can, for the purpose of affecting the title of the holder of a promissory note, allege and prove that he took it from a corporation and holds it under a usurious contract? *Quære*.

6. It seems, that, under the statute last mentioned, if a maker of a note has no defense thereto in the hands of the corporation, he cannot, when sued thereon by an indorsee, allege and prove usury between the corporation and such indorsee. The title of the indorsee, being good as against the corporation, is good as against the maker.

(Before HOFFMAN, WOODRUFF, and PIERREPONT, J. J.)

Heard May 5th; decided, July 28th, 1859.

ACTION by the plaintiff, as indorsee of a promissory note made by the defendant, for \$756, dated January 2, 1856, payable to the order of the International Insurance Company, and alleged in the complaint to have been indorsed to the plaintiffs by the payee, with a further averment that the plaintiffs are now the lawful holders and owners thereof.

The answer "denies that the payees of the note indorsed the same, as alleged in the complaint," and denies that the plaintiffs are the lawful holders and owners thereof, or that the defendant is indebted to them thereon, but says that "the International Insurance Company, mentioned therein, is the owner of the note, and alone entitled to sue thereon, *inasmuch* as, he says, the said note was indorsed and delivered to the plaintiffs as collateral security for a loan of a sum exceeding \$2,000, made by the plaintiffs to the said Company;" that the said Company is a moneyed corporation, &c., &c.; that, at the same time with the indorsement and delivery of the said note, other notes, amounting to more than \$7,000, were, by the same transaction, and as collateral security for the same loan, indorsed and transferred to said plaintiffs; that the indorsement, transfer and delivery of all the notes aforesaid was without any previous resolution of the Board of Directors authorizing the same, and was null and void; of all which the plaintiffs had notice at the time of such indorsement and delivery.

The action was tried on the 16th day of February, 1859, before Mr. Justice PIERREPONT and a jury.

The 11th section of the charter of the International Insurance Company authorized the Company, "for the better security of its dealers, to receive notes for premiums, in advance, of persons intending to receive its policies, and to negotiate such notes for the purpose of paying claims, or otherwise, in the course of its business." (Sess. Laws, 1844, p. 231; id., 1855, p. 505.)

The evidence showed that the note in suit was given to that Company by the defendant for premiums in advance, and that, at some time prior to June, 1856, it was indorsed for the Company by the President, in these words: "For the International Ins. Co. M. Starbuck, Prest.;" and, together with other notes, (amounting, in all, to \$8,215,) was delivered to the plaintiffs as security for the repayment of money loaned to the Company by the plaintiffs, and which money "was received by the Company, and was applied to its ordinary business, the payment of loans, expenses, &c.;" and, on the 30th day of June, the loan so made was reduced by the Company to \$2,800, and the note of the Company, executed by Ogden, their Vice-President, was given to the plaintiffs therefor, and the notes were still left in the hands of the plaintiffs to secure the payment.

It was shown that the negotiation and indorsement of notes by the President or Vice-President was according to the usage of the Company; that that was the way in which all their business was done, and that no resolution of the Board of Directors was passed authorizing this or any of the transfers of notes by the Company, with this qualification, that on the 3d of May, 1852, after a report had been made to the Board of Directors showing the disposition by the officers of various notes which had been received for premiums in advance, a resolution was passed approving and ratifying such disposition, and authorizing the officers "to pay away or negotiate such notes held by the Company, in the further settlement of claims for losses and the debts of the Company;" and the 1st section of the by-laws, adopted December 3d, 1845, was read in evidence, as follows:

"Sec. 1. It shall be the duty of the President or Vice-President to preside at all meetings of the Board of Trustees, and to perform whatever belongs to the executive department of

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the Board, and they or either of them shall have authority to make insurances and sign the policies and contracts of the Company, and transact all its ordinary concerns, and be, *ex officio*, members of all committees, except those relating to the examination of accounts."

In the progress of the trial, the defendant's counsel inquired of a witness, "What was the rate of interest upon the loan made to the Company" (*i. e.*, by the plaintiffs,) "upon these notes?"

The plaintiffs' objection to the question was sustained, and the defendant excepted.

The defendant's counsel also offered in evidence a resolution of the Board of Trustees of the Company, passed June 27, 1856, reciting that the President (Starbuck) had violated the duties of his office by the issue of certificates of stock unauthorized by the Board, and has also issued promissory notes of the Company without a previous resolution, and resolving that he be suspended in his functions as President, and that Charles W. Ogden (the then Vice-President) act as President till the further order of the Board.

On objection from the plaintiffs, the evidence was excluded, and the defendant excepted.

When the parties rested, the defendant's counsel moved to dismiss the complaint, on the grounds—

That no authority was shown in the President to indorse the note.

That there was no previous resolution of the Board of Trustees, and,

That the face of the paper gave notice to the person taking it.

Which motion was opposed by plaintiffs' counsel.

Before the motion was disposed of, the defendant's counsel admitted, as a part of the case, that the plaintiffs advanced the money in good faith when they took the note, and that they had no actual notice of the want of a resolution of the Board of Trustees, or other notice, except what might be derived from the nature of the transaction.

It was also stated by the counsel on both sides, that in their judgment there was no question of fact for the jury to pass upon. And the counsel on each side then asked that the Court should instruct the jury that they were respectively entitled to a verdict.

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And thereupon the said Justice directed the jury to find a verdict for the defendant. To which direction the plaintiffs then and there excepted. The jury thereupon found a verdict for the defendant.

And the said Justice directed the exceptions to be first heard at the General Term, counsel on both sides stipulating, and the Court directing, that judgment be there entered for the defendant, or the verdict be set aside and judgment entered for the plaintiffs for the amount of the note and interest and costs, or a new trial ordered, as the Court may be advised; and in the meantime that the entry of the judgment be suspended.

George C. Goddard, for plaintiffs.

I. The 8th section of the first article of the act in relation to moneyed corporations, (1 R. S., 591,) does not apply to the case. As by the section itself it is declared not to apply, *first*, to the issuing of promissory notes by the officers of the Company in the transaction of its ordinary business; nor, *second*, to transfers for value without notice.

1. This case is within the first exception. (*Brouwer v. Harbeck*, 1 Duer, 114; reversed, 5 Seld., 589; but not on this point, on which it was impliedly affirmed.)

2. It was also within the second exception. (*Howland v. Myer*, 3 Comst., 290, affirming 2 Sandf., 180.)

II. The 11th section of the charter authorized the transaction. This dispensed with a previous resolution. (*Howland v. Myer*, 3 Comst., 293; *Brouwer v. Harbeck*, 5 Seld., 591; 1 Duer, 114.)

III. The transfer of the note by the indorsement of the President was valid.

1. The 3d section of the charter (Laws of 1844, p. 229,) provides that "all the corporate powers of the said Company shall be exercised by a Board of Trustees and such officers and agents as they may appoint."

2. The uniform usage of the Company sanctioned it. (*Hoyt v. Thompson*, 1 Seld., 333, reversing the decision of this Court, but not on this point; *Wood v. The Auburn and Rochester R. R. Co.*, 4 Seld., 167; Paley on Agency, Dunlap's ed., 162; Angel & Ames on Corp., § 240, &c.; *Conover v. Mutual Ins. Co. of Albany*, 1 Comst., 290, 292; *Brouwer v. Harbeck*, 1 Duer, 114.)

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3. The Company received and used the money, and thereby ratified the transfer, and is estopped from denying the authority. The answer itself alleges that the loan was made by the plaintiffs to the Company.

4. The resolution of the Board, passed May 3, 1852, also authorized it.

IV. There was no error in excluding the question as to the rate of interest. No such defense was made by the answer. (Code, § 149.) That the plaintiffs advanced their money in good faith was admitted.

Nor was there error in excluding the resolution of June 27. That transaction was after the transfer of this note to the plaintiffs, and was *res inter alios acta* that could not affect the plaintiffs.

Pursuant to the stipulation, the verdict should be set aside, and judgment entered for the plaintiffs for \$750, and interest from January 2d, 1857, and costs.

James C. Carter, for defendant.

Moses Starbuck, the President, had no authority to indorse the note in suit. There is none contained in the charter or by-laws. There is no evidence that the President ever indorsed, in any similar transaction, on behalf of the Company; and, thus, no authority can be derived by implication from usage. It is an indisputable principle that the President or other officer of a corporation has no authority to do any act for the corporation, except so far as he is authorized by the charter, or some by-law or resolution of the directors, or by some established usage. (*The Life and Fire Ins. Co. v. The Mechanics' Ins. Co.*, 7 Wend., 31.)

Any person taking mercantile paper takes the risk of the genuineness of every indorsement, and of the existence of power to indorse, where the indorsement is by an agent.

II. The transfer of the note in suit by Starbuck to the plaintiffs falls precisely within the terms of the prohibition of the 8th section of the regulations to prevent the insolvency of moneyed corporations, and is, therefore, absolutely void, and the plaintiffs are destitute of any title. (R. S., § 8, art. 1, tit. 2, part I, ch. 18; id., art. 3, tit. 2, part I, ch. 18.)

The absence of the resolution is an interruption in the chain of legal title. The plaintiffs rely upon legal title; and he who

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takes such a title, takes it at the peril of all defects. (*Blunt v. Hanna*, in note to "Cleveland's Banking Laws," p. 7; *Gillet v. Phillips*, 3 Kern., 116.)

III. The plaintiffs are not purchasers without notice, so as to entitle them to the benefit of the exception.

It will not be denied that Starbuck, as an officer of the Company, was a special agent, with limited powers, and that, from the necessity of the case, he could not have, without a resolution, the power to transfer the note, and that whoever undertakes to deal with such an agent is charged with full notice of the extent of his powers, and deals at his peril. (*Life and Fire Ins. Co. v. The Mechanics' Ins. Co.*, 7 Wend., 31.)

IV. The defect in the plaintiffs' title cannot be cured by a subsequent ratification of the transfer by the corporation.

1. The purpose of the Legislature in establishing the prohibition in question was to prevent the insolvency of moneyed corporations, by limiting the amount of power in the hands of officers or agents.

2. The ordinary rule, "*omnis ratihabitio mandato equiparatur*," is inapplicable. The application of the rule in such cases would tend directly to frustrate the intention of the Legislature, and would, in fact, require the significant word "previous" to be stricken from the statute.

V. But, in the present case, the last point is irrelevant, for there is no evidence of ratification.

1. It will be conceded that the ratification must be by the Directors; that the statute is not to be so interpreted and applied as to permit an officer to ratify his own unauthorized and void act.

2. The notion of ratification includes, first, knowledge of the unauthorized act of the agent; and, second, an intention on the part of the principal to assent to and confirm it. (BULLER, J., 2 T. R., 209, note; *Owings v. Giddings*, 9 Pet., 698, 629; *Davidson v. Stanley*, 2 Man. & Grang., 721.) In this case it appears that the Directors never knew of the transaction, and, of course, could not assent to it.

VI. Should the Court be of the opinion that the defendant is not entitled to judgment, then there should be a new trial, for the Judge was in error in excluding the evidence in respect to the rate of interest and to the resolution of the Trustees of June 27, 1856.

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1. The inquiry as to the rate of interest was put in order to prove usury. This is pertinent to the question of good faith in the plaintiff as holder. I do not claim that we had a right to prove usury as a defense: we have not set up usury, and do not wish to do so, but insist we had a right to prove that the plaintiff took the note on a usurious contract, as bearing on the question of his good faith.

2. The excluded resolution was pertinent to the inquiry whether the Company ever ratified or assented to the transfer.

BY THE COURT—WOODRUFF, J. The answer in this case begins with a denial that the plaintiffs are the lawful owners and holders of the promissory note in question, and denies that the payees of the note indorsed the same as alleged in the complaint, or that the defendant is indebted to the plaintiffs thereon in any sum whatever. If these denials stood in the answer unqualified they might perhaps create an issue which would involve every question of legality in the plaintiffs' title which the defendant could raise by proof. The words of the answer which immediately follow, however, show that it was not the design of the pleader nor is it the true meaning of the answer to take any such broad defense; they define and limit the generality of the previous denials, for the sentence continues, "but he says that the International Insurance Company mentioned therein is the owner of the said note and alone entitled to sue for the recovery of the same, *inasmuch* as he says the said note was indorsed and delivered to the plaintiffs as a collateral security for a loan of a sum exceeding \$2,000, made by the plaintiffs to said Company." The answer then states that the amount of notes indorsed and transferred at the same time to the plaintiffs exceeded \$7,000, and the indorsement and delivery of all of them was made without any previous resolution of the Board of Directors authorizing the same and was null and void; of all which the plaintiffs had notice. The plain meaning and only true meaning of which is, not that the note in question has not been indorsed and delivered to the plaintiffs if that can be done without a previous resolution of the Board of Directors of the corporation, but that the plaintiffs made a loan to the International Insurance Company, the payees and owners of the note, of a sum exceeding \$2,000, and to secure

the payment thereof the Company indorsed and delivered to the plaintiffs this and other notes to an amount exceeding \$7,000; but inasmuch as that Company was a moneyed corporation and no previous resolution of the Directors had been passed authorizing the transfer, the plaintiffs acquired no title; and this is I think the whole of the defense. The defendant thus places himself on the single point of objection to the transfer, that there was no previous resolution of the Directors authorizing the indorsement and transfer, but admits that the indorsement and transfer were made.

Upon this state of the pleadings I incline to the opinion that unless it is true, as a matter of law, that a moneyed corporation cannot make a valid indorsement and transfer of notes exceeding in amount \$1,000 in any manner, unless a previous resolution of the Board of Directors be obtained, then the plaintiffs were entitled to judgment on mere production of the note at the trial, unless the defendant proved that the plaintiffs knew when they received the note that no such authority existed, which was not attempted. It will hereafter be seen that such a transfer may be made, and that a *bona fide* holder for value without notice will take a valid title thereby.

The plaintiffs might upon the answer have taken the fact of indorsement and transfer to them as admitted, and confined the inquiry on the trial to the simple question whether there was such a resolution of the Board or whether they took the note in good faith without knowledge of the want of such a resolution.

But on the trial and on the argument of the appeal the case was conducted as if two questions were open: *First*, whether, independent of any legal question growing out of the want of a resolution of the Board, the note was in truth duly indorsed and delivered to the plaintiffs? and although I think the answer of the defendant virtually concedes this, it has been the subject of discussion, and in my opinion that discussion and the proofs clearly show that if the question be an open one upon the pleadings, it must be answered in the plaintiffs' favor. And *second*, in the absence of any resolution of the Board, did the plaintiffs acquire a good title to the note by virtue of the indorsement and delivery to them, notwithstanding the statute relied upon by the

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defendant which prohibits a conveyance, assignment or transfer of any of the effects of a moneyed corporation exceeding in value \$1,000 without such previous resolution?

1. The note in suit is a valid note; to that the defendant has no defense; it was proved to have been given to the International Insurance Company for premiums in advance; the Company had power, by its charter, to receive such notes, and when received they became the property of the Company, assignable and transferable as its own property for any lawful purpose within the proper scope of its business. The eleventh section of its charter authorized it to negotiate such notes in the course of its business, and the fourth section plainly contemplated that it would do so. (Laws of 1844, ch. 156, p. 229; *id.*, 1855, ch. 295, p. 505.) The note was indorsed and delivered to the plaintiffs prior to the 27th of June, 1856, as collateral security for a loan made to the Company, and the money was received by the Company and applied to its ordinary business, the payment of losses, expenses, &c.

There was no want of power in the Company to raise money for such purposes, and therefore there was no illegality in this respect in the transfer. (*Bank of Genesee v. Patchin Bank*, 13 N. Y. R., [3 Kern.,] 309; 19 *id.*, 312; *Marvine v. Hymers*, 12 *id.*, [2 Kern.,] 223; *Central Bank Brooklyn v. Lang*, 1 Bosw., 202; *Holbrook v. Basset*, decided in this Court July 9th instant.)¹

On the 27th June, 1856, the amount of the loan by the plaintiffs was reduced to \$2,800, and to that amount the loan was continued, and the same notes remained in the plaintiff's hands as security, and the loan has not been repaid. It would be difficult to suggest any ground upon which the Company could in equity defeat the plaintiffs' title even if the formal indorsement was defective (unless the statute to be presently noticed invalidates the transfer.)

But the note when transferred to the plaintiffs was indorsed to them by formal indorsement for the Company, signed by Moses Starbuck, their President.

This indorsement was abundantly shown to have been made in conformity with the usual course of business of the Company,

¹ *Ante*, p. 147.

according to its uniform habit and usage. That it was the way in which all their business was done.

This was *prima facie* sufficient authority for the transfer, and the plaintiffs had a right to rely upon it, and the Company having received the money and used it in their business, it was presumptively so far sanctioned and affirmed that unless it was invalid by the statute the plaintiff, as between him and the Company, is entitled to collect it. Nor does it appear that the Company have ever denied the validity of the transfer or sought to disaffirm it.

So far as the plaintiffs' title depends upon the authority of the President to indorse (irrespective of the statute) it is sufficient, and in that respect is plainly distinguishable from the *Marine Bank v. Clements* in this Court where no authority was proved.¹ The uniform usage of the Company was authority enough, as to *bona fide* takers of their negotiable paper for value in the usual course of business.

2. But the defendant insists that inasmuch as the amount of notes transferred as security exceeded \$1,000, the transfer is illegal and void because it was not authorized by a resolution of the Board of Directors, and is therefore subject to the prohibition of the eighth section of the act to prevent the insolvency of moneyed corporations. (Sec. 8 of art. 1, title 2, ch. 18, part I of the Revised Statutes.)

There was no evidence whatever that the plaintiffs had any notice that no such resolution had been passed. Not only so, it was admitted on the trial as a part of the Case that the plaintiffs advanced the money in good faith when they took the note, and had no such notice. It has been repeatedly held in this Court that one who receives a transfer from such a corporation in the usual course of business in good faith, and advances his money in reliance upon an indorsement made in due and proper form, in the manner the corporation is in the habit of indorsing and transferring its notes for the purposes of its business, without any notice that there has been no such resolution, is a *bona fide* holder for value, and is within the saving annexed to the section referred to, and is not to be affected by the want of such a resolution.

¹ 3 Bosw., 600.

Scott *et al.* v. Johnson.

(*Brouwer v. Harbeck*, 1 Duer, 114; 5 Seld., 589; *Howland v. Meyer*, 2 Sand., 180; 3 Comst., 290, and cases next below cited.)

The note was therefore transferred by due authority as between the Company and the plaintiffs, when so indorsed by its proper officer, the President, and there is nothing in the statute referred to which invalidates the transfer, the plaintiffs having received the note for value, in good faith, without notice. (*Central Bank of Brooklyn v. Lang*, 1 Bosw., 202; *The Marine Bank v. Clements* in this Court, November, 1858; *Ogden v. Andre* and *Ogden v. Raymond*, April, 1859; ¹ *Hoyt v. Thompson*, 1 Seld., 833.)

It is therefore unnecessary to consider the effect of the resolution of May 8d, 1852, or of the first section of the by-laws of December 3d, 1845, which it is claimed are sufficient to warrant the transfer upon broader grounds. (See a similar by-law construed in *Howland v. Meyer*, *ubi supra*.)

3. The question, what was the rate of interest on the loan made to the Company on the notes, was properly excluded. It was not alleged in the answer that the transfer was usurious, and therefore evidence to invalidate it on that ground was not admissible. (*McKyring v. Bull*, 16 N. Y. R., 297.)

In no other aspect was it material what was the rate of interest. If the transfer was not invalid because of usury it would not have made the plaintiffs any less *bona fide* holders for value had it been shown that more than seven per cent per annum was reserved upon the loan. The transaction was not either by the answer, on the trial, or on the argument of the appeal, claimed to be invalid by reason of usury. If such a claim had been made, it is at least doubtful whether the statute which prohibits a corporation from interposing usury as a defense, has not operated to render transactions with corporations valid which but for the statute would be usurious and void, and not only valid as against the corporations but so that third persons cannot allege usury of such a transaction and claim that it confers no title upon the lender. Be this as it may, we do not perceive that the question of good faith could in the present case have been affected by any proof on the subject. If corporations cannot interpose the defense of usury and there is no fraud practised, there is no proof

¹ Since reported, 3 Bosw., 600, 4 Id., 585, and *ante*, p. 16.

of bad faith in merely showing that the lender reserved and the corporation agreed to pay more than seven per cent interest. Besides, in the case now before us, it being clearly proved that the note was valid in the hands of the Company, it is quite plain, we think, that the defendant could not set up usury between the corporation and the plaintiffs. Whatever may be the rule where the defendant has a defense good against the note in the hands of the Company, if in truth he has no such defense he cannot refuse to pay and defeat the plaintiffs' action by proof which the Company could not be permitted to give in assertion of a title to reclaim the note. The plaintiffs' title being good as against the Company, and the defendant having no defense to the note, the plaintiffs' title is good as to him. (Laws of 1850, chap. 172, § 1, p. 334; 3 R. S., 5th ed., p. 75.)

4. The resolution of June 27, 1856, suspending Starbuck from exercising the "functions" of President, was properly excluded for several reasons. The note had been transferred to the plaintiffs previous to that time as security for the loan, and the subsequent suspension of Starbuck could not affect their title. The continuance of the loan by way of renewal of a portion thereof did continue to plaintiffs the title originally acquired. That was good until the whole loan was paid off. Besides, the renewal was negotiated and agreed to by Ogden, the Vice-President, who by the very resolution was authorized to discharge the duties of President. And, finally, the plaintiffs had no notice of the resolution and could not therefore be affected by it.

No evidence having been improperly received or rejected; it having been conceded on the trial that there is no question of fact which should have been submitted to the jury; and we being of opinion that upon the facts proved the plaintiffs were entitled to recover, the verdict should be set aside and judgment entered for the plaintiffs for the amount of the note and interest, with costs, in accordance with the stipulation made at the trial.

Ordered accordingly.

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PECK, Plaintiff and Respondent, v. THE NEW YORK AND LIVERPOOL UNITED STATES MAIL STEAMSHIP COMPANY, Defendant and Appellant.

1. A cause of action for extra work and materials alleged to have been done and furnished in enlarging the capacity of and completing a vessel, originally contracted to be built for an agreed sum, where no time of payment for such extra work is stipulated, accrues when such extra work has been completed.
2. The presentation of a bill, containing items of alleged extra work, within six years before suit brought, and the payment of such bill, with the exception of one item, the accuracy of which and liability for which is promptly denied, will not prevent the statute barring all right of action for such item at the end of six years from the time when the alleged service was fully performed.
3. The items of debit for the contract price of the vessel, and for extra work alleged to have been done, and of credits for payments made, do not make a case of "reciprocal demands," within the meaning of section 95 of the Code.
4. To make payments on account of extra work done save all items of work actually done from the operation of the statute, such payments must have been made generally on account, so that they may be properly applied, as well on account of the work which is the subject of the action as of that the liability for which does not subsequently become a matter of dispute. But payments made on account, accompanied with a denial of any liability and refusal to pay for a particular item, do not operate to prevent the running of the statute as to that item.

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 10; decided, July 28th, 1859.

THIS is an appeal by the New York and Liverpool United States Mail Steamship Company, the defendant, from a judgment against it in favor of Zachary Peck, the plaintiff, for \$14,237.17, entered March 4, 1858, on the report of Hon. William Kent, as Referee.

The action was commenced on the 2d of February, 1856, by the plaintiff as general assignee of William H. Brown, (under an assignment alleged to have been made and to be dated October 24, 1855,) to recover \$25,639.75 for extra work and materials alleged to have been done and furnished by Brown in completing the steamer *Atlanta*, "from on or about the 1st of May, 1848, to

on or about the 8th of March, 1850;" and also the further sum of \$10,166.69 for extra work and materials done and furnished in completing the steamer Arctic, from about the 8th of May, 1850, to on or about the 8th of March, 1851. The answer puts at issue all the allegations of the complaint, pleads payment in full for all extra work done, and the statute of limitations "to so much of the plaintiff's demand as relates to the said steamer Atlantic."

When the testimony was concluded, the plaintiff admitted that it was "proved that all the items specified in the bill of particulars of the plaintiff's demand had been paid prior to the commencement of this action, except that specified in the said bill of particulars, as extra tonnage of ship (Atlantic) more than contract, \$9,473.68." The plaintiff claimed to recover this sum, with interest from the 1st of April, 1851.

The Referee, by a report dated February 22, 1858, reported in favor of the plaintiff, allowing said item and interest thereon to the amount in the aggregate of \$14,050.63, and therein stated his conclusions of fact and of law as follows, viz.:

"1st. That the work for which the said charge for enlargement of the said ship Atlantic was made, was fully proved to have been performed, and that such charge was made according to the usual mode of calculating for such work, and there was no contradictory evidence upon this point.

"2d. That the said William H. Brown built the steamships Atlantic and Arctic for what is usually called the 'Collins' line; that the act of incorporation of 'The New York and Liverpool United States Mail Steamship Company' was passed April 11th, 1849. That the building of the said ship Atlantic was commenced sometime in the year 1848, and of the Arctic soon afterwards, but both the said ships passed into the possession of the said Company on the formation thereof, and were built under the sole direction of E. K. Collins, who has continued the agent of the said Company up to the present time.

"3d. That large amounts became due to the said William H. Brown for extra work on the said ships, and that in March, 1851, bills or accounts for the said extra work, including the item in question, were rendered by the said Brown to the said defendant, or to its agent, E. K. Collins; that on the rendering of the said accounts as aforesaid, the Secretary of the said Company, in the

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office of the said agent, undertook to adjust the same with the said Brown ; that the whole of the said bills were allowed, with the exception of the item in question, which was disputed, and one other item for the Atlantic which appeared to be included in the contract.

"4th. That there was a large running account between the said William H. Brown and the said E. K. Collins, (as agent of the said Company,) coming down to March, 1851, and the receipts given by the said Brown to the said Company for the said extra work, (and which were produced by the defendant,) stated that it was 'on account of extra work,' but there was no receipt in full, and it was admitted on the part of the defendant that the item in question had not been paid for ; and it was admitted on the part of the plaintiff that all the other extra work had been paid for ; and I think it right to infer, and I do conclude, that the item in question was, at the adjustment aforesaid, reserved for further consideration, and being now proved and admitted not to have been paid, must be allowed, unless there are other grounds for rejecting it.

"5th. It was urged on the part of the defendant that they were not liable, because this particular item of work must have been done before the said Company was organized. But I think it evident, and so conclude, that the Company, so soon as it was organized under the act of incorporation, recognized the previous acts of their agent, Mr. Collins, and assumed the debts and liabilities he had incurred in respect to these ships ; and this view of the case is confirmed by the fact that the Company paid all the other items in the said bills for work done as well before as after this particular item.

"6th. It was also urged that this claim was barred by the statute of limitations. I do not think this defense can prevail, as I find as a fact that the item in question was part of a long running mutual account between the said Brown and the said Company, (by their agent, Mr. Collins,) reaching into March, 1851, whereas the suit was commenced on the 2d of February, 1856, less than five years.

"It appeared, moreover, from the evidence of Mr. Youle, (a witness for the defendant,) and I so find, that the bills were rendered in March or April, 1851, and that he and Brown then went

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into an adjustment, from which it would be fair to infer, and I so conclude, that that was the proper time for the presentation of the bills; but without this consideration, I think, for the reasons above stated, the statute of limitations cannot apply.

"All which is respectfully submitted."

The defendant duly excepted to the several conclusions of the Referee. The references in the points and in the opinion of the Court, to the evidence, present so much of it as it is important should be stated, in order to understand the principle decided.

The present appeal is from the judgment entered on the report of the Referee.

J. N. Whiting, for defendant, (appellant.)

The claim for enlarging the *Atlantic*, viz., \$9,473.68, is barred by the statute of limitations.

Cause of action accrued when the hull was made one foot deeper and six or seven feet longer. By plaintiff's showing, this work formed part of the contract, and is estimated in the same way. The contract establishes when and how the indebtedness accrued.

The frame was erected by 22d May, 1848. All the deck plank laid 18th September, 1848. 2d February, 1849, ship was launched. The hull was then completed. The keel of the *Arctic* had been laid and paid for as early as the 2d May, 1849.

The ship was then at the wharf of the Novelty Iron Works, receiving her engines. There has been no act by the New York and Liverpool United States Mail Steamship Company to prevent the statute from attaching.

1. No promise in writing.
2. No payment on account of this item, but the reverse.
3. This item was disputed by Collins.
4. No evidence of its having been acknowledged or adopted by Mr. Collins.

5. No mutual account. No account whatever between the plaintiff and the defendant.

Nor between William H. Brown and the defendant.

To constitute a mutual account, there must be reciprocal demands. (Code, § 95; 1 Sandf. S. C. R., 220; 4 id., 312; 4 Kern., 225.)

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There was not even an open, running mutual account between Brown and E. K. Collins, embracing the items in question.

The account current contained no such item: it simply relates to pecuniary dealings generally between the parties.

The bills rendered by Brown, (of which copies are in evidence,) contain no running or mutual accounts.

The books of account in evidence on the part of plaintiff contain items on one side only—not mutual accounts.

The allegation of the complaint is, that the defendant became a debtor for extra work, &c., on the Atlantic, from the 1st day of May, 1848, to the 8th of March, 1850. The precise time at which the indebtedness accrued is not fixed. By the evidence, it appears that the launch of the Atlantic was in the year 1849. And the extra work was among the earliest work done upon her.

By the complaint itself, therefore, as explained by the proof, it appears that the cause of action as to the Atlantic accrued more than six years before this suit was commenced.

The accounts were not between the defendant and Brown, but between Collins and Brown, and contained entries of notes and credit lent, with which the defendant had nothing to do.

The action is not "brought to recover a balance of a mutual, open and current account, where there have been reciprocal demands between the parties." Under the facts of this case, the claim or theory of a "balance of accounts" is an afterthought, and is wholly unsustained.

Gerardus Clark, for plaintiff, (respondent.)

The claim or demand for which the judgment in this action was recovered was part of a large account of William H. Brown, the assignor of the plaintiff, against the defendant, for extra work on the steamship Atlantic, of which he was the builder.

The ship was built by contract; and it appeared on the trial that all the account was paid by the defendants in March or April, 1851, except the item for the enlargement of the vessel. That item was disputed at the time, and left unsettled.

I. The enlargement of the ship Atlantic, by order of E. K. Collins, the agent of the Company, was fully proved by the witness (Jennings,) and that Collins promised that it should be paid for.

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That Collins had the entire control, as agent of the Company, to build the ship as he pleased, is proved by Youle, the Secretary of the Company, who was their witness on the trial.

The fact of the enlargement was also proved by the register of the ship, showing that she was....feet deeper and....feet longer than the contract called for. The mode of calculating the price or cost of such enlargement is also proved by the witness Jennings.

II. Although the evidence of the witness Jennings as to the directions given by Collins as to the enlargement, and as to his promise to pay for it, refers to the deepening of the vessel only, yet he proves that she was increased in length also; and it must be presumed that such increase was by direction of Collins, as the ship was built under his supervision, and he, moreover, had a superintendent constantly there. Probably the increase of depth rendered necessary the increase of length.

III. The objection urged by the defendants, that they are not liable because they were not organized under the act of incorporation at the time the work was done, cannot be sustained:

1. It nowhere appears that the particular work in controversy was done prior to the incorporation. The account rendered for this and other work is dated March, 1851.

2. All the evidence shows that the several individuals whose names are subscribed to the contract, with others perhaps, had projected a Steamship Company, (usually called the Collins line,) as early as the year 1847, and had probably applied for an act of incorporation in 1848: they were actually incorporated early in 1849. The ship was commenced in 1848, and was probably finished in 1850 or 1851; and, on being finished, passed into the possession of the defendants.

3. Collins acted as their agent from the time the Company was projected until its final explosion; and the defendants adopted his acts, recognized their liability therefor, received the ships, assumed the contracts for building the same, and paid the bills which he had contracted on account thereof—even the bills for work done before the date of the item in controversy.

4. Youle, the witness for the defendants, and their Secretary during the whole period of their operations, states that these bills for extra work were presented in 1850 or 1851, and that they

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were settled in April, 1851, (except the item in controversy;) thereby showing that the Company (which had been incorporated in 1849) recognized their liability for the work done on this ship. They ratified the acts of their agent, Collins. Ratifications may be presumed from the acts or omissions of the principal, (*Delafield v. State of Illinois*, 26 Wend., 192;) and ratification relates back to the time of the original transaction, (*Lawrence v. Taylor*, 5 Hill, 107;) and a subsequent ratification is equivalent to an original authority, (*id.*, 137;) and a ratification of a part of the transaction is an affirmation of the whole, (*id.*)

IV. The only other ground of defense urged on the trial was the statute of limitations; which, for the reasons stated by the Referee in his report, cannot prevail in this case.

1. If there was no other reason for the statute not applying in this case, the defendant's own account produced on the trial is sufficient to deprive them of this ground of defense—showing that there were mutual accounts between the parties to a large amount, and extending to June, 1851. The suit was commenced in 1856. (*Tucker v. Ives*, 6 Cow., 193; *Kimball v. Brown*, 7 Wend., 322; *Chamberlin v. Cuyler*, 9 *id.*, 126; *Sickles v. Mather*, 20 *id.*, 72; *Catling v. Shoulding*, 6 T. R., 189.)

The bills (including the item in question) were rendered in March or April, 1851. It is to be presumed that they were rendered as soon as the party had a right to render them, or as soon as the period of credit expired; and, until then, no suit could be commenced; and this is the true test as to the time when the statute begins to run. (2 Parsons on Con., 370, last ed.) The exceptions taken by the defendants to the rulings of the Referee and to his report are not tenable, and the judgment entered upon the report should be affirmed.

BY THE COURT—HOFFMAN, J. The first and important question raised for consideration is the application of the statute of limitations, which is set up in the answer as a bar to the action.

By the 2d of May, 1849, the work for which the present claim is made was fully performed. The demand consists of one separate, independent item, made up on the elements of the contract price, the contract depth and length, and the increase of the latter by a new agreement.

The action to recover this amount was commenced on the 2d of February, 1856.

When this account or item was entered on the books of the plaintiff's assignor does not appear. It is not shown, and it is not probable, that the details of the item in question were entered as the work was done. Probably one general charge for the whole amount was made at one time. This account of Wm. H. Brown was simply of his charges for work done and materials supplied, without any credit or item for moneys or notes paid in liquidation, from time to time.

The account kept by Collins embraces an account of moneys and notes lent by him to Brown for his accommodation from 1848 to 1851, and of Brown's repayment of such advances in money or notes. In this account are also contained the successive payments made by Collins on the contract price of the vessels, and a credit to Brown of such contract price, and also for the value of the extra work and supplies, which Collins allowed, he refusing to admit the item in question. The final entries, adjusting this account and closing it, are made on the 3d of June, 1851, a small credit being given; the sum of \$5,000 received from Brown in cash, and a balance to charges, closing the account, of \$163.89.

The analysis of this account shows, that a balance was arrived at in May, or as of May 21, 1851, of \$5,436.96 against Brown, and that it was liquidated on the 3d of June, 1851, in the manner above stated.

I do not find that Collins had authority even from the Trustees, parties to the contracts, to make the loans and advances he did make, so that, had Brown failed in repayment, the loss would have fallen on them. Still less do I find anything to warrant this part of the account to be stated as with the defendants. I do find that the defendants have recognized a liability for the contract price. Two of the payments on account of the Arctic are expressed to have been received from the defendants, viz., May 2d and May 29th, 1850; and the sums for extras, which Collins allowed to Brown, have been allowed to the former in his account with the defendants, and nothing more.

So it appears to me, we are authorized to break up this account into two parts, the one properly against the defendants acting

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through Collins as their agent; the other personal with Collins being exclusively between him and Brown.

And thus we find that, upon an account of the defendants with Brown for contract price, for extras admitted, for payments on account of both, and premiums paid for him which he was bound to pay, Brown was found indebted in May, 1851, in the sum of \$2,646.87, and so much of the cash payment of \$5,000 on the 3d of June as was necessary discharged this balance. The residue and the small credit paid Collins individually, the balance owing to him.

When, in March, 1851, Collins examined and adjusted, as stated, the bills for extras, he rejected the demand in question, and Brown, in June, 1851, pays him \$5,000, which, in point of fact, discharged a balance of all transactions between them, as Collins claimed.

When did the statute of limitations begin to run? Was it from the date of the rendering of the accounts and allowance by Collins of the principal part and rejection of this item, or from the time when, by the full performance of the work, a cause of action, did in itself, undoubtedly arise, viz., on or before the 2d of May, 1849?

The cause of action arises when and as soon as the party has a right to apply to the proper tribunals for relief. (Angell on Limitations, 41, and cases; *The East India Co. v. Oditeburn Paul*, 7 Moor Privy Council Cases, 85, 14 Jur., 253; *Battley v. Faulkner*, 3 Barn. & Ald., 288.)

In this case, Collins having directed the specific extra work for which the action is brought, and nothing being agreed upon as to price or time of payments, there was a right to demand payment vested in Brown when the work was performed, and an implied undertaking in Collins to pay the value.

The Code (§ 73) has repealed the Revised Statutes as to the limitation of actions, and prescribed the rules which must govern the present case. In strictness it is the Code as in force in April 1849, by the amendments of that date. The provisions which bear upon the question are however identical.

By sections 76 and 91, an action upon a contract, obligation or liability, express or implied, must be commenced within six years after the cause of action shall have accrued.

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By section 95, in an action brought to recover the balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

And by section 110, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party, to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

It may first be noticed that this last section is nearly a transcript of the enacting clause of the 1st section of the statute, (19 Geo. IV, ch. 14,) commonly called Lord TENTERDEN's act. There is no such clause in any English act as that contained in the 95th section of the Code; and the result of the English enactment is, that although there is a running open account, items in it beyond six years are not saved out of the statute by items within six years. This was expressly decided by the Court of Queen's Bench, in *Cottam v. Partridge*, (4 Man. & Grang., 271,) and it was held that the leading case of *Cutling v. Shoulding*, (6 Durnf. & East, 189,) was no longer law since this statute.

Payment of principal or interest on a specific demand, is still retained by the statute as sufficient to keep it in force.

As the 110th section of the Code is identical with the English act; as there is no written acknowledgment of the demand in suit; as there is no part payment of principal or interest of this particular demand, it would appear as a necessary result that nothing can prevent the operation of the statute, unless the case is within the 95th section of the Code. It cannot, I think, be questioned that a perfect cause of action existed on the 2d of May, 1849.

The provision of the Revised Statutes of 1830, (2 R. S., 296, § 23,) was, "that in all actions of assumpsit, debt or account, brought to recover any balance due upon an open, mutual and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account."

We notice that the section of the Code has introduced the additional words, "where there have been reciprocal demands

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between the parties." This is nearly the language of DENISON, J., in *Cotes v. Harris*. (Bull. N. P., 149.) "There must be mutual accounts and reciprocal demands." This case has always been treated as law.

Similar language is used in *Coster v. Murray*, (5 Johns. Ch. R., 522,) *Spring v. Gray*, (6 Pet. U. S. R., 151,) and *Kimball v. Brown*. (7 Wend., 322.)

What, then, constitutes mutuality of accounts and reciprocity of demands? It is not a series of items on one side of the account only. "It never was supposed that items on one side of an account only would draw down former items." (Ch. J. TINDAL, *Cottam v. Partridge*, *ut supra*; see also *Palmer v. The City of New York*, 2 Sandf. S. C. R., 318; *Hallock v. Lozee*, 1 id., 220; *Coster v. Murray*, 20 Johns. R., 602; *Kimball v. Brown*, 7 Wend., 322.)

It may, I think, be much doubted whether, under the Code, where the account consists of items of charge to one party, and nothing but credits of payments by the debtor within six years, the account is such a one as will save items beyond six years from the statute, even if the weight of authority before the Code was in favor of the position that an indefinite payment avoided the statute, so as to keep all previous items in force as of the day of such payment, a point much controverted; the introduction of the words, reciprocal demands, appears to me intended to settle this question. (*Hay v. Cramer*, 2 Watts & Serg., 187; *Gold v. Whitcomb*, 14 Pick., 188; *Lowber v. Smith*, 7 Barr, 381; *Penniman v. Rotch*, 3 Metc., 216; *Abbott v. Keith*, 11 Vt., 525; *Hodges v. Manley*, 25 id., 210; *Blair v. Drew*, 6 N. H. R., 235.)

I apprehend that to meet the requisition of the Code in this particular, we must have such facts as occurred in *Cutling v. Shoulding*, (6 T. R., 189,) *Chamberlain v. Cuyler*, (9 Wend., 128,) and *Chambers v. Marks*. (25 Penn. R., 296.) There must be cross demands, matters of set-off, or counterclaim under our Code; something upon which the other party could sustain an action.

So in *Green v. Ames*, (4 Kern., 225,) the facts, as between Grant and the defendant, presented a similar case. There were mutual dealings. The causes of action or transactions were distinct. Each had an independent right of action. Most of the

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items on each side were within six years, and it was conceded that the statute would not bar a recovery of the balance.

And so in *Catling v. Shoulding* (*ut supra*) the plaintiff had an account for nine years' rent, of which only the last half year was within six years, and the defendant had an account as liquor dealers, some of the last items being within six years. (*Dickinson v. Williams*, 11 Cush., 258.)

Even under the Revised Statutes the case of *Edmondstone v. Thomson*, (15 Wend., 554,) is a strong authority to support these views.

Viewed in this aspect the account between the defendants and Brown, treating Collins as their agent for the items in question, was nothing, but his debits for building the vessels, and for doing the extra work and supplying the extra materials, and their payments on account of this demand. There was nothing on which the defendants could sustain an independent action against him.

But again, even if this view is not sufficient there is another, in my mind, of decisive importance. The principle on which the effect of an indefinite payment on a general open account depends, is acknowledgment. A specific payment directly appropriated to a specific item in such an account, leaves the statute to its operation as to the rest. But when the debtor knows that there exists against him a general account of items, and designedly pays or furnishes something to lessen the demand on such general account without discrimination, and at that time does not deny his liability for the other previous items, the law reaches an implication of his acknowledgment of the whole account.

But how can such an argument have the least force, when the debtor making a payment, at the very time, denies entirely his responsibility for a particular item claimed, disputes its legality, and thus warns his alleged creditor to sue for it?

Without any written signed admission, and with an explicit rejection of the item claimed, it seems to me that Brown was bound to sue, within the period prescribed by law after the cause of action did in fact accrue.

My conclusion is that the statute was a bar, and that the Referee erred.

The St. Nicholas Insurance Co. v. The Mercantile Mutual Insurance Co.

In placing our decision upon this ground, we must not be understood as considering other points taken by the defendants' counsel as without force. On the contrary, those which relate to the difference between the grounds of liability of the Company, and Collins and his associates, are entitled to great consideration.

There must be a new trial, with costs to abide the event.
Ordered accordingly.

THE ST. NICHOLAS INSURANCE COMPANY, Plaintiffs and Respondents, v. THE MERCANTILE MUTUAL INSURANCE COMPANY, Defendants and Appellants.

1. Where an Insurance Company issued to another an open policy for an amount stated, reinsuring such other Company against a certain class of risks described, at a stipulated premium expressed in the policy of reinsurance, such stipulation cannot be altered and the recovery of the premium be reduced or defeated by parol evidence of a verbal agreement, made before or at the time of issuing the policy, that the reinsuring Company would not require the payment of the full premium stipulated, but would abate therefrom fifteen per cent of the gross amount of premiums earned.
2. To allow such proof to operate would violate the rule which makes the writing conclusive proof of the actual agreement between the parties, and forbids that the operation and legal effect of a written instrument shall be varied, altered or affected by proof of a prior or contemporaneous parol agreement relating to the same subject matter.
3. A written instrument may sometimes be reformed on proof that by mistake it was so drawn as not to express the actual agreement of the parties.
4. The operation and effect of such a policy of reinsurance cannot be impaired, or the obligation to pay the full premium stipulated in it be affected, by proof that there is a usage and custom among all Insurance Companies in the city of New York by which the reinsuring Company abates a per centage from the gross amount of premiums stipulated and does not require the payment of the full amount.
5. Nor would it operate to reduce the claim of the reinsuring Company to recover the full amount of premiums stipulated, if in addition to such proof of custom it were shown that prior to issuing the policy it was, in view of

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such custom, agreed by parol that fifteen per cent should be so abated and payment thereof not required.

6. The force and legal effect of an unequivocal and unambiguous agreement between Insurance Companies cannot be altered by proof that there is a usage and custom not to require its performance.¹

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 11th; decided, July 28th, 1859.

THIS action was brought to recover the amount alleged to be due to the plaintiffs for premiums upon an open policy for reinsurance, to the amount of \$195,000, whereby the plaintiffs reinsured the defendants for a sum not exceeding \$10,000 by any one vessel or steamer at any one time, at and from London, Liverpool, Glasgow, Southampton and Havre to New York, Baltimore, &c. The policy to attach on shipments in the ports aforesaid, on and after October 1st, 1852, and prior to October 1st, 1853. The premium to be three-fourths of one per cent; and provided no loss is claimed equal to fifty per cent of the premium for the year on steamers from Havre, Liverpool and Glasgow, then there shall be a deduction of one-eighth of one per cent on steamers sailing from either of those ports on and after the 1st of March and prior to October 1st. And by the terms of the policy the plaintiffs acknowledged the receipt of a note for \$1,000, "being the premium in advance on account of this insurance and is satisfied with the obligation of the said Mercantile Insurance Company for the payment of such further premium as may become due thereon." This note was also set out in the complaint, with an averment that a greater sum for premiums was due. No question arose depending upon the form of the pleadings; nor was there any conflict of evidence as to the amount of the premiums on the risks covered by the policy of reinsurance at the rate of three-fourths of one per cent stipulated in the policy.

The defense was: *First*, that when the agreement for reinsurance was made it was agreed that fifteen per cent should be

¹ This case is published, not because it is believed to contain any new propositions, but because the proof given on the trial showed so general a prevalence of a custom among Insurance Companies, not to require the payment of the full premium for reinsurance stipulated in the policy and the general habit of relying on that custom, that the application made here of the rules of law to a case within that custom is of interest to companies effecting reinsurance, and may suggest the importance of expressing in the policy the true amount or rate of premium to be paid.

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abated from the gross amount of premiums earned under the policy at the rate specified therein. That a prior policy for reinsurance for one year had been made by the plaintiffs, and upon that a memorandum that such fifteen per cent should be deducted was indorsed. But that on the policy mentioned in the complaint the indorsement was omitted by mistake.

Second. That it is and had long been the custom and usage of Marine Insurance Companies in New York, well known to the plaintiffs, to make the rate of premiums in the policies of reinsurance the same as the rates in the policies issued by the reinsured party, and to make an abatement or deduction in favor of the reinsured of a per centage of the gross amount of premiums, such per centage to be fixed and adjusted between the parties, and that the policies of reinsurance made by the plaintiffs were under and subject to that custom and usage, and the abatement agreed upon between the plaintiffs and the defendants was fifteen per cent of the paid premiums.

And, finally, that abating from the gross amount of premiums earned under the plaintiffs' policy the said fifteen per cent, and charging the plaintiffs the losses under the policy, no sum was due to the plaintiffs, but a small balance was due from them to the defendants.

The action was referred to the Hon. JOHN L. MASON, as Referee, to try the issues between the parties.

The whole controversy on the trial was whether the defendants were liable for the premiums on the various risks at the rate mentioned in the policy, three-quarters of one per cent, or were entitled to an abatement therefrom of fifteen per cent of the aggregate amount.

Proof was given tending to show that the plaintiffs had first issued to the defendants a policy of reinsurance for one year, and at the end of that year issued another, which is the one mentioned in the complaint, for another year; and that when the first policy was applied for, the person applying "proposed this reinsurance to them, and that if they would make a deduction of fifteen per cent, the same as all other Companies made on similar contracts on this kind of policy, they might get it." The witness understood them to assent to the proposal, and after that the first policy was made and executed. Other testimony ren-

dered it doubtful whether any such agreement, even by parol, was made.

Much proof was given tending to show that it was the uniform custom in New York, when an Insurance Company obtained a reinsurance of its risks, for the reinsuring Company to make some abatement in its charge from the premiums reserved by the Company so reinsured, so as practically to leave to the reinsured some profit on the risks taken by itself, but reinsured for its own protection.

But the rate of abatement was shown to vary in amount, and to depend upon the agreement made between the parties.

The Referee, subject to objection and reserving the right to determine its legal effect in deciding the case, received all the evidence the parties had to offer bearing upon the question whether any such usage existed, and how far it was uniform or universal, and to what extent it fixed the amount of abatement, and also on the question whether any parol agreement to make any abatement from the rate of premium mentioned in the policy of the plaintiffs now in question, was made between the parties prior or contemporaneously with the execution of the policy; and upon the whole evidence he found and decided as follows, viz.:

"1. That the defendants failed to prove an agreement between them and the plaintiffs, as set up in their answer, for an abatement of fifteen per cent from the gross amount of premiums to be earned by the plaintiffs under the policies of insurance mentioned in the complaint.

"2. That there is a custom or usage among the Marine Insurance Companies in the city of New York, in case of reinsurances among themselves, to make an abatement or deduction in favor of the reinsured from the gross amount of premiums mentioned in the policies, but that there is no customary or fixed rate of this abatement, but that the same is in every instance fixed and adjusted by agreement between the parties."

And the said Referee did thereupon also find as conclusions of law from the above facts:

"1. That evidence of a parol or verbal agreement as to the amount or rate of such deduction could not be received to contradict the written agreement as to the premiums contained in the policies.

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"2. That as it did not appear from the evidence that there was any agreement between the plaintiffs and defendants respecting the rate of abatement or allowance, the defendants could not have the benefit of an allowance, even if evidence of a verbal agreement in relation thereto could have been received."

And he further reported, "that there is due from the defendants to the plaintiffs, for the premiums upon the reinsurance mentioned and described in the complaint, with interest to the date of this report, the sum of \$1,145.01, for which sum the plaintiffs are entitled to judgment."

From the judgment entered upon the report for the plaintiff, with his costs of suit, the defendants appealed to the General Term.

A. Dickinson, for defendants, (appellants.)

I. It appears by the testimony of all of the defendants' witnesses, and the Referee finds, that there is a custom or usage among Marine Insurance Companies in the city of New York, in cases of reinsurance among themselves, to make an abatement in favor of the reinsured.

This abatement is made in lieu of scrip.

II. This abatement is not stated in the policies, (in which a fixed rate of premium, three-quarters of one per cent, is stipulated,) but is a matter of verbal agreement as to the amount.

If nothing is said as to the amount, it is understood to be ten per cent.

III. An agreement to fix the abatement at fifteen per cent of the gross premiums was proved; an offer by the defendants accepted by the plaintiffs.

IV. The custom or usage for an abatement was established, and the Referee so finds. (4 Phil. Ev., Cow. and Hill's Notes, 509, and cases there cited; *Wiggleworth v. Dallison*, Smith's L. C., marg. p. 390, see notes; *Brown v. Byrne*, 26 Eng. L. Eq. R., 247; *Fulton Ins. Co. v. Milner*, 28 Ala., 420; *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md., 217; *Stultz v. Dickey*, 5 Binn., 287; *Burber v. Bruce*, 3 Conn., 9.)

But he rejected the defendants' claim to abatement under that custom, on the ground that the rate was fixed by verbal agreement.

In this the Referee erred, because,

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1st. If the custom or usage of an abatement was established, the rate of abatement and the manner of fixing that rate was also established as a part of that custom ; and,

2d. If a custom is established, by which the amount of premium mentioned in the policy is to be affected, then the agreement as to the rate of such abatement relates to the custom or usage, and may be shown by parol testimony..

The judgment should be reversed, and a new trial ordered.

E. A. Doolittle, for plaintiffs, (respondents.).

I. The defendants not only failed to prove the custom alleged, but their own witnesses show that no uniform or fixed custom prevails among Insurance Companies, even in the city of New York.

Custom or usage to control or affect a contract must be established, and not casual ; general, and not personal or local, and known to the parties, and be constantly observed in the same manner ; or, in other words, it must be uniform. (Parsons on Con., 51-69.)

Evidence of custom or usage is sometimes admissible to add to or explain what is doubtful, but not to contradict or vary a written contract. (5 Hill, 437 ; 25 Barb., 319 ; Smith's Lead. Cas., marg. ref., [307,] 405-416.)

In this case, the policy specifies the premium, viz.: three-quarters of one per cent, and provides for a reduction upon the happening of certain events. There is nothing ambiguous or uncertain in the language used, nor is there anything from which any implication can be raised that the agreement is in itself incomplete.

The President and Secretary of plaintiffs knew no such custom.

II. The charter requires and provides that all contracts of insurance shall be signed by the President and countersigned by the Secretary.

A corporation can act only in the mode prescribed by the act creating it, and the acts of the agent are binding only so far as done in pursuance of that law. (*McCullough v. Moss*, 5 Denio, 567.)

III. The plaintiffs' case was fully made out by production of the note ; defendants then introduced statement of Higgins, showing the amount found by Referee to be due the plaintiffs, unless

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defendants proved the agreement to deduct fifteen per cent, and this was agreed upon by both parties. The defendants failed to prove the agreement set up in the amended answer, and the Referee has so found as a question of fact, and his finding is conclusive.

IV. The Referee's conclusions of law are correct. But if they were not, they would furnish no ground for a new trial, because all defendants' evidence was received; and they fail because they could not prove their defense.

BY THE COURT—WOODRUFF, J. It is to be noticed that although the amended answer herein alleges that there is a usage and custom among Insurance Companies in the city of New York to make the rate of premiums in policies of reinsurance the same as in the policies issued by the reinsured party, and to make an abatement or deduction in favor of the reinsured, of a per centage of the gross amount of premiums; yet it is also stated, in the answer itself, that the rate or amount of the abatement is matter of agreement. The custom is therefore not relied upon in the answer as itself operating to modify the express contract between the parties fixing the rate of premium to be paid by the defendants at three-fourths of one per cent; but the allegation of the usage and custom is alleged by way of inducement, or as preparatory to the averment that the rate of abatement was in this case fixed, by actual agreement between the parties, at fifteen per cent of the gross amount of premiums accruing under the policy. The answer, therefore, including the amendment thereto, amounts to this: (1.) The plaintiffs, when the said reinsurance was made and the policy executed, agreed to make an abatement of fifteen per cent from the gross amount of premiums earned under the policy. (2.) There being a usage and custom among Insurance Companies in the city of New York, when they reinsure, to make an abatement from the gross amount of premiums earned under the policy, the rate of abatement to be agreed upon between the parties, the plaintiffs did, when the policy of reinsurance was made, agree to abate fifteen per cent from the gross amount of premiums accruing to them under such policy.

We might, therefore, since the whole defense set up in the answer depends on the question whether such an agreement was proved, dispose of the appeal by saying that the Referee has found, as matter of fact, that no such agreement was made; and that, on a careful examination of the testimony, we cannot say that his finding is so against the weight of the evidence that it should be disturbed.

But the case was tried upon an assumption that a defense would be established by proof of either of two facts, viz.: That there was a parol agreement between these parties, that the plaintiffs would abate fifteen per cent from the rate of premium stipulated in the policy of reinsurance, or that there was a usage and custom in the city of New York, among Insurance Companies, to make such abatement in favor of other Companies effecting reinsurance. Without therefore reviewing the evidence in support of the finding of the Referee, that the defendants failed to prove the agreement set up in the answer and the amendment thereto, or the evidence in reference to the custom relied upon, we think proper to observe that in our judgment the proposed defense utterly fails upon strictly legal grounds applicable to both of the supposed defenses relied upon; for unless we are prepared to hold, *first*, that an express agreement to pay premiums of insurance, according to certain rates stipulated in writing, can be altered by proof that there is a custom in the city of New York not to require its performance; or, *second*, that such an agreement can be altered by proof of a parol agreement, prior or cotemporaneous with the written policy, that the defendants should not be bound to pay so much as they in fact agreed to pay, then the defense wholly fails, whatever parol proof was offered or given in support of it.

It is not necessary at this day to cite authorities to the proposition that a written instrument cannot be altered, or its legal operation or effect be impaired or modified, by evidence that the parties agreed by parol that it should not be obligatory according to the terms and effect of the writing. It is true that, on proof of a mistake by reason whereof the writing fails to express the actual agreement, the writing may be reformed; and this was doubtless the idea of the pleader in the present case, when the answer was at first prepared. The proof, however, wholly fails

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to show mistake; and the proposition, therefore, recurs, that the parties, having expressed in writing the agreement which they have made, and that in terms which are clear and unambiguous, the defendants cannot be permitted to show that there was a parol agreement, antecedent to or cotemporaneous with the writing, that the defendants should not be compelled to pay so large a rate or sum for the premium of reinsurance as, by the terms of the policy, they were bound to pay. To a rule so well settled, any work upon evidence may be consulted, if authority is desired.

It is, in our judgment, no less clear that proof of a usage and custom, however uniform and universal among Insurance Companies in the city of New York, not to require a reinsuring Company to pay the full premium which, by the policy of reinsurance, it is stipulated shall be paid, cannot legally operate to impair the effect of an agreement to pay a fixed rate settled by the policy.

A written agreement, which is in no wise of ambiguous or uncertain import, is to have effect according to its terms, and the parties are bound thereby; and the express stipulations of parties cannot be overruled or set aside by any custom not to require their performance according to their tenor.

This is not a question regarding the mere incidents to the defendants' undertaking, but it is a question whether a written agreement is itself binding. If the decisions in *Woodruff v. Merchants' Bank*, (25 Wend., 673,) affirmed in *Error*, (6 Hill, 174,) and in *Brown v. Newell*, (4 Seld., 190,) are law, much more is it true that a defendant cannot avoid his express promise by proof of a local custom not to require its performance. (Anth. N. P., 70; *Cooper v. Kane*, 19 Wend., 386; *Hunton v. Locke*, 5 Hill, 437; *Merc. Ins. Co. v. State Ins. Co.*, 25 Barb., 320; *Machine Co. v. Partridge*, 5 Fost. N. H. R., 369; *Atkins v. Howes*, 18 Pick., 16; *Wheeler v. Nurse*, 20 N. H., 220; *id.*, 246; *Barlow v. Lambert*, 28 Ala., 704; 30 *id.*, 167, 608; *Cudwell v. Meek*, 17 Ill., 220; 18 *id.*, 126; *Linsley v. Lovely*, 26 Vt., 123; *Coricin v. Patch*, 4 Cal., 204; *Webb v. Plummer*, 2 B. & Ald., 746; *Blackett v. Assurance Co.*, 2 Cr. & Jer., 244; *Ford v. Yates*, 2 Mann. & Grang., 548; *Trueman v. Loder*, 11 Ad. & El., 589; 39 Eng. Com. Law R., 183, notes.)

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We have thought it advisable to say so much upon the questions discussed on the appeal. It may, perhaps, be useful to those who have occasion to effect reinsurance to know that they are liable to pay the rate of premium specified in their policy, notwithstanding there is a custom in New York for the reinsuring Company to make an abatement therefrom, and also that they cannot be protected against a claim for the stipulated premium by proof of a prior or cotemporaneous parol agreement that a less sum only should be required.

The judgment must be affirmed.

LOUISA S. SHOTWELL, Plaintiff and Respondent, v. THE JEFFERSON INSURANCE COMPANY in the City of New York, Defendants and Appellants.

1. Where a policy of insurance upon buildings against loss or damage by fire provides, "that in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without the consent of the insurers manifested in writing, the policy shall thenceforth be void and of no effect," and where the insured contracted to sell and convey the insured property to one S. for \$5,500; viz.: \$2,500 cash, and \$1,500 in twelve and \$1,500 in twenty-four months, and to keep the premises insured, and that the benefit and indemnity against loss and damage by fire should enure to the said S., who was to pay to such insured the premium she might pay for the insurance, and to convey the property by warranty deed to S. on full payment by him of the purchase money; and S. forthwith took and kept possession of said premises; and where subsequently and after the \$1,500 first payable had been paid, and before the other \$1,500 was paid, and while the policy was in force, the premises were damaged by fire to more than \$2,000, the sum insured; and where no notice of the contract between the insured and S. had been given to the Company until after the loss; the insured is entitled to recover to the extent of the unpaid purchase money and interest due thereon, and to that extent only.
2. The contract and its partial performance do not transfer or terminate the whole interest of the assured; but it continues to the extent of the amount of the purchase money remaining unpaid.
3. It is no defense or ground for exonerating the insurers from liability, that after suit brought upon the policy and prior to the trial, S. paid the purchase money in full and received a deed of the insured premises.

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4. By force of the agreement between the insured and S., the latter is entitled to the benefit of the sum recovered; and becomes equitable assignee of the right of action accruing from the loss by fire; the policy in force at the time of the loss having been obtained by the insured pursuant to the said contract between her and S., and the latter having paid to the insured the premium thereon.

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 10th; decided, July 28th, 1859.

THIS case comes before the Court on an appeal by the defendant from a judgment entered in favor of the plaintiff for the sum of \$2245, with costs.

The action was tried before Mr. Justice PIERREPONT without a jury on the 4th of November, 1858, a trial by jury having been waived.

The action was commenced March 21st, 1857, and is brought upon a policy of insurance executed by the defendants, to indemnify one William Shotwell against damage by fire, to certain buildings situated at Macon, in the State of Georgia, and alleged to have been damaged by fire to the amount of \$2,000, while the policy was in force.

The policy was produced at the trial, and is dated the 2d of November, 1844; its material portions are as follows:

"No. 45,098.

"The Jefferson Insurance Company in the city of New York. By this policy of insurance, the Jefferson Insurance Company, in consideration of \$55, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure William Shotwell, loss, if any, payable to Henry R. Shotwell, against loss or damage by fire to the amount of two thousand dollars on his frame buildings, situated at the corner of Third and Mulberry streets, in Macon, Georgia, and marked Nos. 1, 2, 3 and 4, on plan and application filed, No. 8,000, in this office; said buildings privileged as extra hazardous stores and dwellings. \$2,000 one year at 2½ per cent, \$55."

"May 29th, 1854.

"This Company recognize H. R. Shotwell as owner.

"J. MILTON SMITH, *Secretary*."

"November 14th, 1854.

"This Company recognizes Louisa Shotwell as owner.

"M. TUCKER, *President*."

"And the Jefferson Insurance Company above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, his executors, administrators and assignees, all such loss or damage not exceeding the amount insured, as shall happen by fire to the property above specified, from the 2d day of November, 1844, at twelve o'clock at noon, unto the full end and term of one year thence next ensuing, which term will expire on the 2d day of November, 1845, at twelve at noon, the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and to be paid within sixty days after due notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy.

The plaintiff also gave in evidence certain renewal receipts, continuing the said insurance, in the name of William Shotwell, down to January 12, 1855, and in the name of the plaintiff (who had become the owner of the insured premises) from that time, the last three of which receipts are as follows:

"No. 92,627.

"Received, New York, January 12th, 1854, of William Shotwell, sixty dollars, being the premium on two thousand dollars insured under Policy No. 45,098, which is hereby continued in force for one year, to wit, from the 12th day of January, 1854, until the 12th day of January, 1855, at noon.

"MACON, Geo.

"MOSES TUCKER, *President*.

"(Attest,) J. MILTON SMITH, *Secretary*."

"No. 97,442.

"Received, New York, January 12, 1855, of Louisa Shotwell, sixty dollars, being the premium on two thousand dollars insured under Policy No. 45,098, which is hereby continued in force for one year, to wit, from the 12th day of January, 1855, until the 12th day of January, 1856, at noon.

"MACON, Geo.

"MOSES TUCKER, *President*.

"(Attest,) J. MILTON SMITH, *Secretary*."

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"No. 102,607.

"Received, New York, February 5, 1856, of Louisa Shotwell sixty dollars, being the premium on two thousand dollars insured under Policy No. 45,098, which is hereby continued in force for nine months, to wit, from the 12th day of January, 1856, until the 12th day of October, 1856, at noon.

"MACON, Geo.

"MOSES TUCKER, *President*.

"(Attest,) J. MILTON SMITH, *Secretary*."

The Policy contained the following clauses: "And this Policy is made and accepted in reference to the proposals and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

"The interest of the assured in this Policy is not assignable, unless by consent of this corporation manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this Policy shall from thenceforth be void and of none effect."

Among the conditions annexed or attached to the Policy, were the following:

"Property held in trust or on commission must be insured as such, otherwise the Policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein.

"The interest of the assured in this Policy is assignable, provided the consent of the Company be first obtained to the transfer. Notice of such assignment shall be given before any loss may have happened; and this Company, when so notified, may elect either to continue the insurance, and express the same by indorsements on this Policy, or refund a ratable proportion of the premium for the time of the risk unexpired, and cancel the Policy.

"Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the Company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with

their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just.

"All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on this Policy."

The following agreement was given in evidence:

"GEORGIA, BIBB COUNTY:

"KNOW ALL MEN BY THESE PRESENTS: That I, Louisa Shotwell, of the State of Illinois, am held and firmly bound by these presents, to Dr. E. L. Strohecker, of said county of Bibb, in the sum of five thousand five hundred dollars, to the true and faithful payment of which sum to him, his heirs, executors, administrators, and assigns, I do hereby bind myself, my heirs, executors, and administrators.

"In testimony whereof, I have hereunto set my hand and seal this twelfth day of May, 1855.

"Now the condition of this obligation is such that, whereas I have this day sold to the said Strohecker a certain lot or parcel of land in the city of Macon, known and distinguished as 'the Shotwell Lot,' situate on the corner of Mulberry and Third streets—it being part of lot No. 8, and square No. 22, according to the plan of said city of Macon—embracing one hundred and five feet front, more or less, on Mulberry street, and running back on the upper line to the small alley or passage running across from Second to Third street, and running back on the line of Third street to the property now owned by the Messrs. Tracy, which lot is the same now occupied by the said Strohecker and S. Day, on Mulberry street, and Binder and Miller, on Third street, and which is actually and fully described in a deed to me made by Henry R. Shotwell, and now of record in the Clerk's Office of the Superior Court of said county of Bibb, for the sum of five thousand and five hundred dollars, in the following payments, to wit: twenty-five hundred dollars in cash, and the remainder, in two equal installments of fifteen hundred dollars each—one due at twelve months from date, and the other at twenty-four months from date; for which said installments, he, the said Strohecker, has made and delivered his two several notes now in my possession—both bearing even date with these

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presents—one due at twelve months, and the other at twenty-four months; the last named bearing interest from date, payable semi-annually; now, therefore, if he, the said Strohecker, shall well and truly pay to me the said several promissory notes at maturity, and upon such payments being so made, I shall make and deliver to him good warranty titles to the property hereinbefore described; then this obligation shall be null and void, else remain in full force and effect.

“Signed, sealed and delivered, the day and year above written.”

The finding of the Judge was as follows:

“*First.* That the said defendants did, on the 5th day of February, 1856, insure the said plaintiff against loss or damage by fire to the said premises in the manner set forth in said Policy and receipts.

“*Second.* That before the said contract of insurance was last renewed as aforesaid, the said plaintiff, by virtue of the said agreement dated May 12th, 1855, contracted to convey the said premises unto Edward L. Strohecker, who thereupon, and by virtue of the said contract, entered into the possession and enjoyment of said premises, and has ever since so continued.

“*Third.* That the said defendants had no notice of such contract of sale, or of any conveyance by the said plaintiff of any interest in the said premises, or of any change of possession thereof, until after the said 4th day of December, 1856.

“*Fourth.* That on the 27th day of September, 1856, the said premises were, without fraud or fault on the part of the insured, damaged by fire to the amount of more than the sum of two thousand dollars, and that the said preliminary proofs of such loss and damage were furnished unto the said defendants as early as the said 4th day of December, 1856.

“*Fifth.* That at the time the said contract of May 12th, 1855, was executed by the plaintiff and delivered unto the said Strohecker, he, in pursuance of the terms thereof, paid unto the said plaintiff the sum of two thousand five hundred dollars in cash, and also his two certain promissory notes, each for the sum of \$1,500, by him made payable to his own order, and by him indorsed, both dated the day last aforesaid—one payable twelve months after date, and the other payable twenty-four months

after the date thereof, with interest; and that the said notes were by the said Strohecker duly paid as the same respectively became due, except the last note, which was not paid until the 13th day of June, 1857, because the deed of conveyance was not ready until then to be so delivered.

"*Sixth.* That upon the payment by the said Strohecker of the said last mentioned note, the said plaintiff executed and delivered unto him a deed of conveyance of all her right, title and interest in and to the said premises, and has not since had any interest whatsoever therein.

"*Seventh.* That by agreement made and entered into between the said plaintiff and the said Strohecker, of which the defendants had no notice, plaintiff was to keep the said premises insured, and the benefit and indemnity against loss and damage by fire was to enure to the said Strohecker, who was to pay unto the said plaintiff the premium she might pay therefor, and the said insurance existing at the time of said loss was by the plaintiff obtained in pursuance of the said agreement.

"*Eighth.* That the said premises were immediately after the said fire worth more than the sum of two thousand dollars, and the damage caused by the said fire was repaired by the said Strohecker at his sole expense."

And upon the foregoing facts the said Justice did find as matter of law that the said plaintiff sustained loss in the buildings insured and damage by means of the said fire to the amount of two thousand dollars.

And that by reason thereof the said plaintiff is entitled to recover against the defendants the said sum of two thousand dollars, with interest thereon from sixty days after the 4th of December, 1856—being in all the sum of \$2,245.

To which finding and conclusions of the Judge, the counsel of the defendants duly excepted.

Judgment was entered upon the decision of the Judge, from which the present appeal was taken.

E. W. Stoughton, for defendants, (appellants.)

I. A policy of insurance being a personal contract of indemnity, nothing in the law is better settled than that the insured can never recover beyond the extent of his interest in the sub-

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ject insured. (2 Comst., 210; 8 Hill, 501; 18 Wend., 94; 17 N. Y. R., 391.)

II. Upon the sale of the premises to Strohecker, the plaintiff retained the legal title thereto, although in equity they belonged to the vendee. The plaintiff also retained an insurable interest in the property to the extent of \$3,000, being the amount of the unpaid purchase money; but such interest was contingent, and liable to be extinguished upon the payment of the two notes, or upon a sale and transfer thereof without recourse.

Before the fire in question, one of these notes was paid, and soon after the maturity of the last note, and as soon as the deed was ready for delivery, that was paid also. Thus the insurable interest of the plaintiff in the premises was extinguished, and her right to indemnity gone; for it is well settled that an insurance by the vendor of property covers only his remaining interest therein, and cannot be resorted to for the benefit of the vendee. (*Ætna Ins. Co. v. Tyler*, 16 Wend., 385, 396-399; *McLaren v. Hartford Fire Ins. Co.*, 1 Seld., 151; *Howard v. Albany Ins. Co.*, 3 Denio, 301; Angell on Fire and Life Ins., § 66; Parsons on Merc. Law, 508, &c.; 2 Phillips on Ins., 419; 17 Penn. R., 253; 21 id., 513; 16 Peters' U. S. S. C. R., 501; 17 N. Y. R., 392; 393; 9 Paige, 568.)

The case of *Kernochan v. The Bowery Fire Insurance Company* does not change, or profess to change, the law as above laid down.

There it was conceded that Kernochan, who was insured as mortgagee, was entitled, as such, to the amount claimed by him, and therefore had a corresponding insurable interest in the property. It was also said by the Court, that but for the existence of this interest his policy would have been void.

III. The fact that, at the time of the loss, the plaintiff had a contingent interest in the premises to the extent of \$1,500—the amount of the unpaid note—affords no ground of recovery even of that sum.

1. Because the negotiable promissory note of Strohecker having been given for the balance of the purchase money, is to be regarded as a substantial payment thereof. Nor could the plaintiff have recovered against him the balance of the purchase money without producing such note, and canceling the same upon the trial. (*Dayton v. Trull*, 23 Wend., 345.)

2. Because it is proven that such note was paid before the trial, whereupon the insurable interest of the plaintiff in the premises became absolutely extinguished, and her right to indemnity for a loss, which fell wholly upon another, gone.

8. If it be said that the plaintiff was at the commencement of this suit entitled to recover to the extent of the unpaid purchase money, the defendants, upon payment of that sum, would have been entitled to be subrogated to her right to recover that amount of Strohecker. This claim having been extinguished by payment during the pendency of this action, affords a complete defense to the plaintiff's demand against the underwriters. (See the cases cited under the second point.)

IV. By the terms of the policy, its assignment during the existence of the risk, without the assent of the defendants, would have rendered it void; whilst a transfer of the interest of the plaintiff in the subject insured would have deprived her of the right to recover.

If she may, however, by a secret arrangement between herself and her assignee or vendee, undertake, notwithstanding such assignment or transfer, to hold the policy for his benefit, the provision to which I have referred becomes inoperative, and the underwriter may be compelled to indemnify those whom he has never undertaken to insure.

V. Even upon the principles supposed to have been laid down by ROOSEVELT, J., in the case of *Kernochan v. The Bowers Insurance Company*, the plaintiff, at the time of the fire, had an insurable interest in the premises to the extent of only \$1,500, the amount of the then unpaid note given for the purchase money. Upon the foregoing grounds the defendants are entitled to judgment.

Daniel Lord, for plaintiff, (respondent.)

The statement of the facts is in the finding of the Judge.

The law of the case is covered by the decision in *Kernochan v. The Bowers Insurance Company*, in the opinion concurred in by the five Judges. (17 N. Y. R., 428.)

I. At the time of the insurance, (February 5, 1856,) of the fire, (September 27, 1856,) and after this action was brought, (March

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21, 1857,) and until the delivery of a deed for the land, (June 17, 1857,) the plaintiff owned the property.

She was, under a contract of May 12, 1855, to convey the property upon certain payments being made, the last falling due in May, 1857, (after this suit was brought,) and in the meantime to effect insurance to apply in case of loss, as a payment on the contract, the contracting purchaser paying her the premium.

The agreement to keep insured was part of the contract to sell, and the defendants cannot set up a part without taking the whole.

But as collateral to the sale and to the insurance, it was admissible in evidence. (17 N. Y. R., 435.)

2. This ownership was the legal title and full insurable interest in the property; it was not an insurance of the contract debt, but of the property. (17 N. Y. R., 435; *Reed v. Cole*, 3 Burr. R., 1512; *Oliver v. Greene*, 3 Mass. R., 133.)

3. It was not a trust estate, held for the purchaser, although he had remedies at his option analogous to those of a *cestui que trust*. He had the option of a specific performance of his contract, or to sue at law for the non-performance by the contracting vendor, if she refused to convey or to keep insured, and could recover in money. The plaintiff was, in equity, in a position identical with that of a mortgagee; and the case of *Kernochan* is therefore in point.

II. Under a policy in general terms on a building, all interests, general or special, are covered, unless the defendants make inquiry and are deceived. (17 N. Y. R., 437; opinion of NELSON, J., 12 Wend. R., 512; affirmed, 16 Wend. R., 392.)

III. There is nothing for the insurers to claim by subrogation; for the insurance money was to go and pay the contract price, and to the benefit of the contracting purchaser. (17 N. Y. R., 436.)

IV. The payment and deed in June, 1857, after action brought, cannot be given in evidence to defeat the action as to form. (*McKyring v. Bull*, 16 N. Y. R., 297.)

2 Nor do they bar the plaintiff to recover the insurance under the agreement with the contractor.

V. 1. All the objections to the preliminary proofs fail, unless the defendants can contradict the above points of the plaintiff.

2. There is no evidence of any objection to their sufficiency when delivered, or at any other time since. (17 N. Y. R., 433.)

BY THE COURT—HOFFMAN, J. Previous to the fire causing the damage for which the action is brought, the plaintiff (the assured) had entered into a contract with Strohecker, which was so far executed as, according to the settled doctrine of a court of equity, to make the latter the owner of the property, entitled to its profits, liable for impositions upon it, and subject to any loss which might fall upon it by fire or otherwise. He had gone into possession. He could have been compelled to pay the balance of his purchase money, notwithstanding the destruction of the property. In short, he was the absolute equitable owner in possession, and entitled to the legal title upon payment of \$1,500, the unpaid purchase money. (*McLaren v. The Hartford Fire Co.*, 1 Seld., 151.)

By a condition of the Policy, "in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent," (the consent of the insurers, manifested in writing,) "this Policy shall from thenceforth be void and of none effect." Again, "the interest of the assured in the policy is assignable, provided the consent of the Company be first obtained to the transfer."

The transfer, by sale or otherwise, indicated in the first clause, is the transfer of the property and the plaintiff's interest therein; and the object and effect of this and similar conditions is forcibly stated in the late case of *The State Mutual Insurance Company v. Roberts*. (31 Penn. R., 438.) "The safety of the insurer is dependent much upon the character of the assured—not alone upon his integrity and good faith, but upon his habits of carefulness, prudence and vigilance. It is not the purpose to stipulate for a new contract with the assignee. It is designed, rather, to afford substantial protection to the underwriters, by enabling them to preserve, during the continuance of the risk, the safeguards which existed at its origin—those found in the honesty and watchfulness of the assured."

There are several cases, some in our own Courts, which bear upon the question.

In *Conover v. The Mutual Insurance Company of Albany*, (3 Denio, 254, and 1 Comst., 290, on appeal,) the clause of the charter, "whenever any property insured by this corporation shall be alienated by sale or otherwise, the Policy shall be void," &c., was considered. It was held that a mortgage creating only a lien upon

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the land was not a violation of the provision. The Company had also given a consent to the assignment of the Policy to the proposed mortgagee. The Judges speak of the alienation mentioned in the act as being an absolute transfer of the title to the property.

In *Masters v. The Madison County Mutual Insurance Company*, (11 Barb., 624,) the Policy was executed on the 8th of June, 1848, in favor of the plaintiff, for five years. The Policy was subject to the 7th section of the act of incorporation, "that, where any property insured shall be alienated by sale or otherwise, the Policy should thereupon be void." On the 15th of March, 1850, a written contract was made by the plaintiff with one Hicks to sell and convey the premises to him, and give him a good deed by the 1st of September ensuing. Hicks was to pay \$3,250—\$500 to be paid on the 1st of September, and the balance in annual installments of \$200 each, to be secured by bond and mortgage. Hicks was given immediate possession, but there was a stipulation that, upon any default in the payments, he was to yield up possession and forfeit the contract.

On the 19th of July, 1850, the property was destroyed by fire. It did not appear that payment had been made of the \$500 payable the 1st of September, nor anything else done to carry out the contract. It was held that there was no alienation within the provision of the Policy, so as to defeat the plaintiff's right to recover.

Hodges v. The Tennessee Marine and Fire Insurance Company, (4 Seld., 416,) amounts to this: That where the assured was the owner in fee at the date of the Policy, and made a deed absolute on its face, but proven (by parol testimony even, there held admissible) to be intended simply as a mortgage, an assignment of the Policy to the mortgagee, with the assent of the Company, entitled the assignee to recover. There is nothing to indicate that the mortgagee went into possession. The assured retained an insurable interest at the time of the loss, viz., the equity of redemption. In fact, he remained the owner as to the question of interest in the premises, and the mortgagee had become, with the assent of the insurers, assignee of the Policy, and entitled thereby to recover the amount of the loss.

In *Hooper v. The Hudson Fire Insurance Company* (15 Barb., 418, and, on appeal, 17 N. Y. R., 424,) the Policy contained the same provision as in the present case. The Policy would expire

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the 18th of March, 1853. On the 21st of June the stock covered by the insurance was sold under execution, and the plaintiff became the purchaser. On that day he applied for and obtained a consent of the Company to the assignment of the policy to him, without disclosing what interest he possessed. The assignment was made on the 30th of June, and on the 1st of July, 1852, a portion of the property was destroyed by fire.

These positions were held by the Court of Appeals: After the sale, and before the assignment of the Policy, no recovery could have been had, not because the Policy had become void, but because the insured had suffered no loss, and the owners of the goods (the purchasers, it is presumed) had no claim, for they had no interest in the Policy. The Policy, however, was not extinct, and, being assigned with the Company's assent, it reattached to the goods.

The proposition of Judge BARCULO, in *Tillou v. The Kingston Mutual Insurance Company*, is recognized in *The Buffalo Steam Engine Works v. The Sun Mutual Insurance Company*, (17 N. Y. R., 412,) that a transfer of one joint owner to his coöwner was not within the prohibition of the Policy. (*Wilson v. The Genesee Mutual Insurance Company*, 16 Barb., 511.)

In *Dey v. The Poughkeepsie Mutual Insurance Company*, (28 Barb., 623,) a transfer of the interest of one of the parties to the Policy to the other party, and a stranger, by way of general assignment for creditors, was held to be within an interdiction in the Policy similar to this. The object of the provision was to protect the Company from controversies with strangers, or persons other than those with whom they have contracted.

In *McLaren v. The Hartford Fire Insurance Company*, (1 Seld., 151,) insurance was made by the plaintiff with the defendant on the 17th of January, 1843, for one year. R. H. Cumming held two mortgages on the premises. He obtained a decree of foreclosure, and the property was sold on the 6th of September, 1843, and purchased by Quackenbush. He paid the deposit required by the terms. Of the purchase money, \$12,000 was to be secured by bond and mortgage, and the balance paid on the 1st of October ensuing, or as soon as the decree of sale should be enrolled, when the master's deed would be ready for delivery. The purchaser was to keep the premises insured, and to assign

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the Policies to protect the mortgagee. A fire occurred on the 11th of October. The decree was not enrolled until the 6th of November, and the deed was then delivered. The Policy contained the usual clause, that in case of any transfer or change "of title in the property insured, the insurance should be void."

The Court held, "that the sale under the decree vested a complete equitable title in the vendee to the mortgaged premises." It was apparent that the transfer of the ownership of the mortgaged premises was within the spirit of the condition of the Policy. Foot, J., said: "Although the naked title may not vest in the purchaser till the deed be given, yet the whole right and interest passes to him immediately on the sale, and he becomes thenceforth the owner. By a decision of the Supreme Court made in 1843, and afterwards affirmed by the Court of Appeals, the master's sale passed the interest of the parties presently, and the deed when given related back to the time of sale."

It is of consequence to notice that, in this case, the Policy had been assigned to Cumming to secure payment of the mortgages held by him exceeding the amount insured.

The Court also say, that whether the conclusion they had before stated was so or not, McLaren could not recover without showing a valuable interest in the subject insured.

It is clear that it was considered that his valuable and insurable interest had been extinguished and divested by the sale.

Some authorities in other States may be usefully referred to.

In *Powers v. The Ocean Insurance Company*, (19 La. R., 28,) under a similar clause, it was held, that where there was a sale and possession, and the property reverted by reason of unpaid purchase money, the Policy was suspended during the possession of the intended purchaser, and revived on the property reverting to the vendor, and possession held by him at the time of the loss.

So in *Trumbull v. The Portage County Mutual Insurance Company*, (12 Ohio, 305,) it was decided that an agreement for a sale, and part payment of the purchase money, was not a breach of such a condition where the assured remained in possession, and no conveyance was made.

In *Norcross v. The Insurance Companies*, (17 Penn. R., 429,) the vendee of goods received part of the price, and remained in possession at the time of the loss. He was held to be covered by a

Policy made with him before the sale for so much as remained unpaid.

Upon a careful consideration of these authorities, we do not find that an executory contract of the nature of that in question, even when it creates an equitable title, and the intended purchaser is let into possession, is a breach of such a provision of a Policy against alienation without consent, as we find in this case. The mere fact of a change of possession would seem to apply to a lease or mere tenancy, as well as to the present case.

2. The case is then to be considered upon the theory that the contract in question, executed as it was, does not amount to a violation of that prohibition.

To my mind, it is clear that the plaintiff could not recover more than the unpaid purchase money due when the action was commenced.

There must be an insurable interest, not only at the date of the Policy, but at the time of the loss, to entitle the plaintiff to recover. The plaintiff, although he continued vested with the legal title, retained nothing of an insurable interest in the property, but for the unpaid purchase money. We may treat this interest as continuing. The Policy remained in force *pro tanto*. By the successive payments, the original entire right in the subject has been abridged and parted with, and the insurable interest diminished. (3 Denio, 305.)

Again: Strohecker obtained, after the contract and possession, an insurable interest in the property, not merely commensurate with his payments as successively made, but for the full value. His actual payments, his liability for the balance, and his title as equitable owner, gave him this right. (*The Aetna Ins. Co. v. Tyler*, 12 Wend., 507; 16 Wend., 385; *McGivney v. The Phoenix Fire Ins. Co.*, 1 Wend., 85.)

Strohecker, in his own right and as purchaser of the premises, cannot claim the slightest interest in the present Policy. The rights and relations between the plaintiff and defendants cannot, in any mode, directly or indirectly, be affected by anything done or contracted between the plaintiff and him without the Company's assent. So far as the present case is concerned, the rule remains, as I think, in its absolute force, that "a Policy of insurance, before a loss, is a chose in action, which is not

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assignable so as to pass the legal interest." (3 Denio, 305; 17 N. Y. R., 424.) It constitutes a personal contract between the assured and insurers, in which three great elements are conspicuous and controlling: an insurable interest in the subject at the time of the loss; a continuing title in the Policy at that time, which will enable the insurers to measure and terminate their liability by dealing with him alone, or in reference to him alone; and the due observance of all the conditions and stipulations of the Policy. To allow that Strohecker got a right which enables the plaintiff to recover any of the insurance money for his benefit, beyond the extent of their own interest, is to make the defendants partially his insurers; to assume the risk of his possible heedlessness or dishonesty, when they had provided for the advantage of the plaintiff's prudence and integrity. And it may be observed that the reasoning which sanctions the retention of an insurable interest in the plaintiff for unpaid purchase money, is wholly insufficient to warrant an implied transfer of an interest in the policy to Strohecker for any indemnity to him.

I do not think that anything in the cases of *Benjamin v. The Saratoga County Mutual Insurance Company*, (17 N. Y. R., 415,) or *Kernochan v. The New York Bowery Fire Insurance Company*, (id., 429,) conflicts with the view I have thus taken. In the former, the mortgagee obtained an insurance as agent of the owners, and apprised the Company of his interest. He foreclosed and became the purchaser, and agreed to convey to Brainard; then the Company agreed that the policy should continue in force until the title was perfected in Brainard, the vendee, he agreeing to pay the premiums, of which the defendants had notice. "The fair interpretation of the agreement, that the policy should continue valid until the title should be perfected in Brainard, is, that the indemnity should inure to the benefit of Brainard as well as of the plaintiff. To the extent of his equitable interest in the property, the plaintiff is to be regarded as holding the Policy in trust for him."

The other case seems also distinguishable on various grounds.

When an insurance is made expressly with a mortgagee, the insurer is apprised of the existence of a mortgagor, who he is bound to know is the actual owner, and it may be a presumption that an actual owner is in possession.

Again: The clauses as to a consent for the assignment of the policy, or to an alienation, did not come into consideration in that case. The bearing of such provisions upon the present case, in any view, has been already stated fully.

The contract was with the mortgagee, explicit and absolute, without regard to the sufficiency of the bond or solvency of the debtor. He had an insurable interest in the property to the amount of the policy, because his interest or his debt exceeded or equaled it. It was an insurance of the property, not of his demand. The Company merely altered a former Policy in favor of Kernochan, by adding the word "mortgagee."

The view thus taken involves the result that the judgment was wrong in allowing more than \$1,500, the unpaid purchase money, omitting for the present the consideration that this sum has been paid since the action was commenced.

The counsel for the defendants insists, that had they paid that amount, they would have been entitled to resort to Strohecker to recover the unpaid balance from him, upon the doctrine of subrogation.

This rule of subrogation rests upon the foundation of a clear natural equity, and can only exist when it is just, both that the party claiming it should be indemnified, and that the party against whom it is asserted should answer the demand.

When a surety pays the debt, both of these requisites exist. When an underwriter pays a general average, this is equally the case. (16 Wend., 398.) When, as in *The Quebec Fire Insurance Company v. St. Louis*, (7 Moore's Pr. Coun. C., 236,) the insurers pay a demand covered by the policy, for which an action could have been sustained against others, whose wrong caused the loss, the rule in its full extent is justly observed.

The French writers are full of disquisitions upon this subject.

In supposed analogy to the rule in marine insurances, the question has been raised and much discussed, whether the insurer against fire, who has paid a loss to the assured, is entitled to all the actions he possessed against tenants, neighbors, &c., under article 1733 of the Code.

The question is presented in two forms: one whether the right of subrogation exists absolutely without agreement or cession,

(*de plein droit*;) the other, when the assured has stipulated to cede, or has actually ceded, such rights.

Article 1733 of the Code gave a right of action to the owner against the tenant for damage caused by fire, unless it arose from inevitable accident, superior force, fault of construction, or was communicated from a neighboring building.

Against an incendiary, or the neighbor in whose building a fire has originated through his fault or negligence, all the writers agree that there is a right of subrogation upon a principle of equity, and the insurer succeeds to the privileges of the assured. The reasoning of M. Pardessus on this point is admitted universally. (Alauzet *Traite Des Assurances*, tom. 2, arts. 477, 478.)

But it seems to be equally settled that, as between the tenant, responsible under the article of the Code before cited, and the insurer, there is no such right of subrogation given as matter of law.

The contested point appears to have been, whether the insurer could lawfully stipulate in his policy for the acquisition or cession to him of this right against a tenant. (Grun & Folliat *Des Assurances Terrestres*, art. 296.)

The discussion of this point is very interesting, and the strength of the argument is, in my judgment, with those who deem such stipulations void. The liability of the tenant is by force of a rigorous law, which great views of public policy dictated, but is often harsh and inequitable in its application. It is a purely personal liability to the owner. There is no mutual engagement of the tenant with the insurer, or joint contract with the creditor. They are strangers to each other. The tenant is no more primarily responsible than the insurer, and, in an equitable view, is less so. The contract of insurance has its full effect between the parties by payment of the damage, and cannot survive to assume a new face against a third person.

It appears, however, that a decision was given by the Tribunal of Montdidier, and affirmed on appeal by the Court of Amiens, supporting such stipulations, and sustaining an action by the insurers against the owner of an adjoining house in which the fire originated. (Grun & Folliat, p. 247, n.)

Even in this view of the law, we find a substantial distinction between the rule there stated and the present case. The insurer makes it part of his contract that he shall have these privileges,

and in that view undertakes the risk and graduates his premium. There was no such stipulation here. The precepts of equity, so far from approving such a substitution, are hostile to it. "It would add to the affliction of one, already an innocent victim of misfortune."

The result is, that the defendants had no right to a subrogation had they paid the \$1,500 upon the commencement of the suit.

3. One question remains, viz.: the effect of the payment, during the pendency of the action, of the \$1,500, the amount of the purchase money unpaid at its commencement.

It seems to me that the following considerations may dispose of this point. It is perfectly equitable that, as between the plaintiff and Strohecker, the insurance money should go to the latter. Had the Policy been assigned to him after the loss, and before the suit, he could have brought the action in his own name. (*Mellen v. The Hamilton Fire Insurance Company*, 5 Duer, 101; 17 N. Y. R., 609.) On payment of the note to the plaintiff he could have required an actual assignment of the Policy, and recovered the amount of the insurable interest which the plaintiff had at the time of the loss and institution of the suit. By the agreement between him and the plaintiff, she was to keep the property insured for his benefit; and it is in evidence that he paid the last premium to the plaintiff, which she paid to the defendants in February, 1856, and which continued the Policy in force to the time of the loss. We think that the payment of the remaining debt during suit, coupled with the agreement and payment of the premium, has operated as a virtual equitable assignment of the plaintiff's interest in the Policy; and as she had a clear right of action at its commencement, we see no reason why the Court should act upon proof of such payment, not even brought before it by any pleading, to defeat what is a just demand against the Company.

The result is, that the judgment must be reversed, and a new trial ordered, with costs to abide the event, unless the plaintiff consents to a reduction of the amount so as that the judgment shall stand for \$1,500, with interest from the 2d of February, 1857, being sixty days after the 4th of December, 1856. If the plaintiff so consent, the judgment will be affirmed for the reduced amount, and reversed as to the residue.

Ordered accordingly.

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HALL, Plaintiff and Respondent, v. MERRILL, Defendant and Appellant.

1. An unconditional agreement between an insolvent debtor and part of his creditors to accept his notes for a designated portion of the amount he owes to them severally, in satisfaction of the whole, is obligatory upon such creditors.
2. The relinquishment of a part of their demands by those signing the agreement, and the surrender of their right to enforce them in full, is a sufficient consideration to uphold it.
3. Such an agreement implies, though it does not in terms contain, a promise of each of the creditors signing it to and with every other of such creditors to accept the composition stipulated for, and to abstain from all efforts to collect more.
4. Where such an agreement bears date December 15th, 1857, and provides that the notes to be accepted in satisfaction shall be for equal amounts at six, nine and twelve months, from January 1st, 1858, it is not indispensable to the continuing validity of the agreement, that such notes be delivered or tendered on said first day of January. If no demand of them be made, they must be tendered within a reasonable time.

(Before HOFFMAN, WOODRUFF and MONCRIEF, J. J.)

Heard, May 12th; decided, July 28th, 1859.

THIS is an appeal by the defendant from a judgment entered against him for the sum of \$690.81. The case was tried before Mr. Justice SLOSSON, without a jury, on the 15th of November, 1858.

The complaint states the sale and delivery of goods by the plaintiff to the defendant on credit, at various times, and in various parcels, between the 11th day of April, 1857, and the 26th day of March, 1858, amounting in the aggregate to the sum of \$577.82, for which sum, with interest on the amounts respectively, as the several periods of credit expired, judgment was prayed. All the sales, except one for \$5.25, were made before the 26th of October, 1857. This one was made on the 26th of March, 1858.

The answer first denies every allegation of the complaint except as therein "admitted or avoided."

It then alleges that on the 15th day of December, 1857, the plaintiff executed and delivered, together with other creditors of the defendant, a certain instrument in writing, (called in the state-

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ment of facts found, a *release*,) under his hand and seal of which instrument and the signature of the plaintiff the following is a copy:

"Whereas, in consequence of sundry losses and misfortunes, Benjamin B. Merrill has become unable to pay his debts in full, we, the undersigned, in consideration of one dollar to us in hand paid, receipt of which is hereby acknowledged, agree to receive, in full payment and settlement of our respective claims against him, his three notes for equal amounts at six, nine and twelve months from January 1, 1858, at forty cents on the dollar.

"In witness whereof, we have hereunto set our hands and seals this 15th day of December, 1857.

"ELIZUR HALL. [L. s.]"

The answer then alleges the execution by the defendant of three promissory notes, each for \$78.18, at six, nine and twelve months respectively, dated the 1st of January, 1858, to the order of the plaintiff, the proffer of such notes to him on or about the 1st of February, 1858.

That these notes were given for the composition of the demands mentioned in the complaint, and that the action for the same is thereby barred.

It then alleges, as a set-off as to the item of \$5.25, a purchase of goods to the amount of \$13.25, on the 26th of March, 1858, by the plaintiff from the defendant.

In another part of the answer it is averred that the instrument aforesaid was signed by the plaintiff and eleven other persons or firms, the creditors as aforesaid of said defendant, relying upon the good faith of both plaintiff and defendant in carrying out the terms of such agreement, as far as they were respectively concerned. It avers his readiness and willingness to carry out the agreement.

The answer seeks affirmative relief in the following manner: Wherefore, this defendant demands judgment against the plaintiff that the said agreement in writing be specifically performed; that the plaintiff be adjudged to receive the three notes in satisfaction of his claims, and the money upon such as have fallen due; that he be perpetually restrained from commencing any action upon such claims, or from assigning or disposing of the

same, and that the defendant may have such further relief as the nature of the case may require.

The plaintiff, by way of reply to the counterclaim for equitable relief, denies each and every allegation in that part of the answer, except as thereafter admitted. He admitted the execution of the composition deed, but sets up that he was induced to do so, by false and fraudulent representations of the defendant, as to his losses and insolvency; that the defendant engaged that all his creditors should sign the deed, and that it was to be of no effect without this was done; that none were to be paid over forty cents on the dollar; that all have not signed such deed, but on the contrary, a portion of them have refused to sign it, and some of them have been paid their demands in full, and that some who did sign, have, under promises to that effect, been paid their demands in full.

The only evidence given upon the trial was that of the plaintiff upon his own examination. He proved representations made by the defendant as to his situation, but gave no evidence tending to show any falsehood or fraud in them.

He testified that one or two other creditors had signed the composition deed before he signed it himself; that the notes mentioned in the deed were to be delivered at least as early as the 1st of January; they were tendered about the middle of February, and that he refused to accept them, stating that his signature was procured through fraud.

The question was put to the witness by the Court, whether there was any, and if any, what, consideration for his signing the composition deed?

An objection of the defendant's counsel to the question was overruled, and an exception taken. The witness answered, there was none, except his promise to give the notes.

The plaintiff having rested, and the defendant offering no testimony, the learned Judge found as follows:

"1st. That the release set forth in the pleadings was executed without any consideration moving from the defendant to the plaintiff, except the promise to give the notes referred to in the pleadings on the 1st of January, 1858.

"2d. That the release was signed by the plaintiff on or about the 15th December, 1857.

"3d. That the said release was signed after two or three other creditors of the defendant had signed the said release.

"4th. That the defendant bought the goods at the times and for the prices charged in the complaint.

"5th. That the defendant tendered the notes to the plaintiff required by the release, on or about middle of February, 1858, and not before.

"6th. That when the first note became due the defendant tendered the plaintiff the amount of money due thereon, which the plaintiff offered to receive and apply on the general account, but not as a fulfillment of his, defendant's, agreement, but which defendant refused to pay for that purpose or on that understanding."

And the Court found as a conclusion of law upon the foregoing facts:

"That the release is no bar to the plaintiff's recovery herein—to which conclusion of law and ruling the defendant's counsel then and there excepted, and the Court thereupon ordered a judgment for the plaintiff for the sum of \$606.90, with the costs."

From the judgment entered on this decision, the present appeal is taken.

E. W. Dodge, for plaintiff, (appellant.)

I. The Court erred in receiving evidence of the want of consideration in the composition deed.

1. Because this was not an action upon a sealed instrument; nor,

2. Was there any set-off in the action founded upon the deed. (2 R. S., 406, [§ 77.])

The statute only applies to cases of an action upon a sealed instrument, and where a set-off is founded upon any sealed instrument. Therefore, we say the seal was conclusive evidence of a consideration in all other cases, as before this enactment.

II. The composition deed expressed a consideration which was sufficient, whether received or not for the reason that the plaintiff could recover it by action. (1 Sandf., 58; 2 id., 312.)

1. The grantor cannot contradict the acknowledgment of a consideration, for the purpose of defeating a conveyance, (in a case free from fraud.) (2 Hill, 554; 2 Denio, 336.)

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2. A Court will not, as between the parties to a deed, permit proofs of non-payment of a nominal consideration for the purpose of destroying the deed. (2 Barb. Ch., 232.)

III. This instrument, executed by the plaintiff and other creditors to the defendant, was a composition deed. It contains all the elements and requisites of such an instrument, the most important of which are:

1. An agreement between the creditors themselves; and,
2. An agreement between the creditors and the debtor.

Again: It provides that each creditor shall receive the sum or security which the deed stipulates to be paid or given, and no more; and,

That, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who signed the deed. (4 Sandf., 83, 84.)

IV. This deed was a bar to a recovery in this action, and the plaintiff should have been required to fulfill, on his part, and to receive the notes in full satisfaction of his claims.

V. The notes were tendered to the plaintiff, which he refused to receive, and the money was tendered to the plaintiff on the note which first became due, which the plaintiff refused to receive; and as there was no time fixed in the deed when the notes were to be delivered, and being offered before the maturity of the first note, they were offered in time, and it should be so held.

Therefore, we say the Court erred in giving judgment for the plaintiffs, and a new trial should be granted.

O. L. Stewart, for respondent.

I. The judgment in this action is sustained by the evidence in the case, that the defendant was justly indebted to the plaintiff as charged in the complaint.

The Judge on the trial below found as one of his conclusions of fact in the case:

"That the defendant bought the goods at the times, and for the prices charged in the complaint."

This is not in any way disputed or denied by the defendant.

II. The written instrument set forth in the defendant's answer is no bar to the plaintiff's recovery in this action.

1. It is without consideration, and is not therefore effectual as a defense. (*Warren v. Skinner*, 20 Conn. R., 559.)

2. The seal is not conclusive evidence of consideration.

The Revised Statutes, which treat of evidence, declare, that "in every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed. (3 R. S., 691, 5th ed.; *Russell v. Rogers*, 15 Wend., 353-359; *Tallmadge v. Wallis*, 25 Wend., 112-115; *Gilleland v. Failing*, 5 Denio, 312.)

3. The instrument in question is not a release *in presenti*, nor is it effectual as such. The most that can be claimed for it is, that it is an agreement to release, to take effect upon the giving and receiving of the notes therein mentioned; and, as that agreement was without consideration, it cannot be enforced against the plaintiff.

4. It is not a composition with all the creditors of the defendant; therefore, it stands in the position of an accord simply, without satisfaction. Under the old practice a plea of accord was not good as a bar to the action. Satisfaction must also have been averred and proven. So, under the present practice, an accord is no defense without satisfaction.

In *Fellows v. Stevens*, (24 Wend., 294,) it is held by the Court, COWEN, J., that, "As between a debtor and creditor, an accord to accept a less sum than the whole debt is no bar, though satisfaction is tendered; but, if the accord extend to *all* the creditors of the debtor, it is otherwise."

In order to make an accord, with tender of satisfaction merely, a good defense, it must be averred and proven that the accord was in consideration of all the creditors coming into the agreement. In the present case, the instrument does not purport to be between the debtor and all his creditors; and it is not so averred or stated in the answer, or shown in the proof; nor was such the fact.

In *Brooklyn Bank v. De Grauw*, (23 Wend., 341,) Chief Justice NELSON says: "An accord and *tender of performance* is no bar to an action. To render an accord a bar, it must be executed."

Judge BRONSON says, in *Daniels v. Hallenbeck*, (19 Wend., 408,) "The very point of the plea being that the plaintiff accepted the thing in satisfaction."

In *Russell v. Lytle*, (6 Wend., 391,) Judge MARCY held: "An accord must be executed. Readiness to perform is not sufficient."

5. Even if the instrument was a perfectly good and binding agreement against the plaintiff, at the time it was signed, he is completely discharged from any liability to perform and complete it, on account of the failure of the defendant to make and tender the notes at the time agreed upon.

The agreement was signed on or about the 15th day of December, 1857, and the notes were to be delivered on or before the 1st day of January, 1858. But they were not tendered to the plaintiff until the middle of February following. (*Heathcote v. Crookshanks*, 2 Term R., 24; *Fellows v. Stevens*, 24 Wend., 294—see 302.)

Judge COWEN says: "All the cases hold that if the terms of the composition agreement be not exactly followed out by at least a tender of the substituted securities *at the very day*, the creditor is remitted to his remedy for the *whole original debt*."

III. Even if the Justice below erred in admitting testimony to prove want of consideration for the instrument in question, still his judgment should be sustained upon the entirely distinct ground set forth in the fifth subdivision of the second point. Whether there was or was not consideration for the instrument, becomes perfectly immaterial, when it is proven that the defendant failed to comply with the terms and intent of such instrument. The admission or rejection of testimony upon consideration can have no effect upon the distinct issue of performance.

IV. The question to which exception was taken, was put to the witness by the Court, and the answer called forth by it had already been previously given by the witness, in answer to a similar question put by the plaintiff's counsel without objection; therefore, if the exception were, in the second instance, well taken, it constitutes no ground for interference with the judgment.

BY THE COURT—HOFFMAN, J. The subject of the nature and legal operation of composition deeds was considered much

at length in the case of *Renard v. Tuller*, in January, 1859, before the General Term of this Court.¹ The action was upon promissory notes given in the course of business, and the defense was a composition instrument as follows: "We, the undersigned creditors of the firm of Tuller, Hart & McCorkle in consideration of the sum of one dollar to each of us paid, agree to accept the sum of sixty cents on the dollar in their notes at six, nine and twelve months, from the 1st of February, 1857, without interest, in full satisfaction of our respective claims against said Tuller, Hart & McCorkle.

"All claims to be put on the same basis, and considered as due on the 1st February, 1857, by allowing or deducting interest, and the original notes are to be held as collateral until the notes given in compromise are paid." Dated 6th January, 1857.

Creditors to a considerable amount had signed before, and creditors to a large amount had signed after, the signature of the plaintiffs. The liabilities were about \$225,000, and the whole amount of the demands of creditors who signed was \$87,000.

It was held that there was nothing in the instrument or evidence to show that the signature of the plaintiffs was upon any condition that all should sign. And it was held that the composition instrument was a bar to the action. The basis of the doctrine is the relinquishment to the debtor, by others who sign, of a part of their claims, or the concession of some modification of the right to enforce them. This constituted the consideration. This existed without any clause of a mutual agreement between each other, as well as with the debtor, which was found in several of the cases. The implication of such a contract between themselves was raised, and was equivalent to its being expressed.

The English and American authorities were examined, and the result as stated by Baron PARKE in *Norman v. Thompson* (4 Exch. R., 755,) was recognized. "An agreement by two or more of the creditors (unconditional) to enter into a composition is perfectly good and binding as to those parties, whether the others do so or not. The agreement by each individual to give up part of his claim is a sufficient consideration."

In the present case it is not proven that more than two or three creditors signed the instrument at all. It is found by the

¹ 4 Bosw., 107.

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Judge that two or three signed before the plaintiff signed. It is not shown that any signed afterwards. It is true that the answer states that the plaintiff and eleven other persons or firms, creditors of the defendants, signed the instrument. And to the fourth clause of the answer which contains this averment, a reply was put in, although the answer was sworn to in July, 1858. But, as before stated, this part of the answer is by way of counterclaim, asking for affirmative relief by compelling the plaintiff to take the notes in full discharge of his demand. The reply, however, denies every allegation in this part of the answer contained, except as thereafter admitted. I apprehend then that even assuming a reply was necessary, yet under the 153d section of the Code, the allegation as to the number of creditors who signed was put in issue. The general denial was sufficient. The release itself does not appear to have been given in evidence.

We think, however, that enough appears in the case to bring it within the scope of the rule laid down in *Renard v. Tuller*, before referred to. We do not think it essential to prove that creditors subscribed a composition deed, or agreement, after the plaintiff in the action signed it, in order to give it validity. If so, it would not be binding upon the last signer, and its efficacy in each case might depend upon parol testimony of the time of execution. A legal presumption might well be allowed, in the absence of distinct proof, that the execution was contemporaneous by all, under one general influence and one general consideration, although the location of names on the paper might indicate a signing one after another. But, in that view, proof of the actual time of execution, even if admissible, is unimportant.

The next question is, whether the fact of the non-delivery of the notes until the middle of February was such a breach of a condition of the composition deed as to exempt the plaintiff from its obligation.

The plaintiff was permitted to prove this fact, and, also, that the notes were to be delivered as early as the 1st of January, without objection.

The instrument itself only prescribes that the notes were to be at six, nine and twelve months from the 1st of January, 1858. No time for the delivery of the notes is expressed in it. The implication may be reasonable that the 1st of January was to be

the period of delivering the notes; and their reception then may have been of moment for the business purposes of the plaintiff. Yet it is clearly not made a condition in the instrument; and if no demand of the compromise notes was made by the creditor, we think it a sufficient performance on the part of the debtor if he tendered the notes within a reasonable time.

It is, I apprehend, the rule that a debtor must strictly observe any conditions affixed by a creditor to his consent to a composition; and, where the condition is expressed, that a certain amount of claims should be signed off, on the same terms, by a specified period, and it is not done, the creditor should be held not bound, although a short time may elapse after the day fixed before it was accomplished, and no special injury was shown.

The cases referred to by Justice COWEN, in *Fellows v. Stevens*, (24 Wend., 302,) were of this character. The instruments of composition contained stipulations, or clauses, amounting to conditions precedent. See *Oughton v. Trotter*, (2 Nev. & Mann., 71,) where LITTLEDALE, J., takes the distinction above noticed, that, in common cases of agreements to take composition, the debtor has a reasonable time to give the notes; but, in that case, it was stipulated, they should be given in fourteen days.

I think there was error in the conclusion of law of the learned Judge, in giving judgment for the amount of the original debt.

This view renders it unnecessary to consider the propriety of the question put by the Court.

There must be a new trial, with costs to abide the event.

Ordered accordingly.

THE FARMERS' AND MECHANICS' BANK, Plaintiffs and Respondents, v. THE EMPIRE STONE DRESSING COMPANY, Defendants and Appellants.

1. Where a manufacturing Company was incorporated "for the purpose of carrying on the business of cutting, sawing and dressing stone of all kinds, and the business of stone cutting in all its branches," and its by-laws provide that the Secretary, "in the prosecution of the business, may make,

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draw, indorse and accept notes and bills of exchange," such Secretary has no authority to accept a bill for the accommodation of the drawer, drawn and used to raise money for the use of the latter.

2. Nor has the President or Trustee or Manager of its affairs, any such authority by mere virtue of his office or agency.
3. The Company is not liable, upon such an accommodation bill, so drawn and accepted by the Secretary, by direction of such President or Manager, to a holder who discounted the same for the drawer before it was accepted, notwithstanding he received the bill in good faith, and paid value therefor, in the expectation that it would be accepted, and in ignorance of the fact that it was drawn for the accommodation of the drawer, and that the Company had no funds of the drawer.
4. One who discounts a bill of exchange before acceptance by the drawee, does so on the credit of the drawer or indorser, or both, and is not a holder for value paid on the faith of the acceptance.
5. Whether any or all the officers of such a corporation can bind the corporation by accepting bills for the accommodation of third parties? *Quære.*

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 5th; decided, October 29th, 1859.

APPEAL from a judgment in favor of the plaintiffs for the sum of \$2,575.25 and costs, upon the report of John P. Crosby, Esq., Referee, to whom the cause was referred.

The action is brought by the plaintiffs as indorsees of two bills of exchange, drawn upon the defendants by the Hartford Quarry Company. One of the bills is dated April 5th, 1854, for the sum of \$2,000, payable sixty days after its date, to the order of Charles T. Shelton, and is accepted thus, viz.:

"Accepted at Empire City Bank.

"GEO. SHERMAN, *Secretary.*"

The other of the bills is dated May 19, 1854, for the sum of \$500, payable thirty days after its date, to the order of C. R. Shelton, (Clark R. Shelton,) and is accepted thus, viz.:

"Accepted at Empire City Bank.

"GEO. SHERMAN, *Secretary.*"

The plaintiffs are a banking corporation chartered by the State of Connecticut, and doing business at Hartford, in that State.

The defendants are a manufacturing corporation, organized under the general law of the State of New York authorizing the

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formation of corporations for manufacturing, mining, mechanical or chemical purposes, passed Feb. 17, 1848, (Sess. Laws of 1848, ch. 40,) in compliance with which the certificate (which was signed, acknowledged and filed in order to create the corporation,) declared and defined the "objects for which the Company was formed," in these words, viz.: "For the purpose of cutting, sawing and dressing stone of all kinds, and the business of stone cutting in all its branches."

The bills of exchange in question were both drawn in Connecticut, and were discounted by the plaintiffs, in their usual course of business, at Hartford, for the account and at the request of the drawers, before they had been accepted or presented for acceptance.

The answer of the defendants, (so far as it is material to state its contents,) denied that the bills of exchange were, or that either of them was, accepted by the defendants. And it also averred, specially, that the bill for \$2,000 was accepted in their name, out of the course of their regular business, and without consideration to them, by one George Sherman, pretending to act under their authority, but that said acceptance was so made without their authority or consent, and was fraudulent and void.

The Referee found, as matters of fact, "that the plaintiffs are a corporation duly created by the Legislature of the State of Connecticut, in 1833, and that they transact their business at Hartford, in said State. That the defendants are a corporation organized under the General Manufacturing Law of the State of New York, passed in 1848.

"That between the 5th day of April, 1854, and the 7th day of May, 1854, the defendants duly accepted a certain bill of exchange for \$2,000, drawn by the Hartford County Quarry Company, upon the defendants, dated on said 5th day of April, and payable to the order of Charles T. Shelton, in sixty days after the date thereof.

"That the same was discounted at legal rates, on or about its date, by the plaintiffs, for and at the request of the drawers thereof.

"That through an oversight said bill was not indorsed by the payee thereof until after maturity and protest thereof for non-payment.

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"That between the 19th day of May, 1854, and the 21st day of June, 1854, the said defendants duly accepted a certain other bill of exchange for \$500, drawn by the Hartford County Quarry Company upon the defendants, dated on said 19th day of May, and payable to the order of Clark R. Shelton, in thirty days from the date thereof.

"That the same was, on the day of its date, indorsed to the plaintiffs, who discounted the same at legal rates, for and at the request of the drawers thereof.

"That neither of said acceptances was made in the prosecution of the business of the defendants, but solely for the accommodation of the drawers thereof, and that the defendants never received any consideration for such acceptances, but that the plaintiffs had no actual notice thereof.

"And that there was a payment made to said plaintiffs, on account of the indebtedness arising upon said acceptances, of \$500; on the 12th day of October, 1855, and that the balance due on said acceptances is still due and unpaid."

He found, as a conclusion of law, from the foregoing facts, "that the said defendants are indebted to the said plaintiffs in the balance of said indebtedness, with interest, amounting in the whole, at the date of this report, to the sum of \$2,575.25, for which sum the plaintiffs are entitled to judgment.

"Dated NEW YORK, Nov. 24, 1859."

The defendants excepted to the findings and decisions of the Referee, in that he found that the defendants duly accepted the bills; that he did not find that the same were accepted by the Secretary of the defendants without authority and in excess of his powers; and, third, that he found that the defendants are indebted to the plaintiffs in the sum of \$2,575.25.

On the trial the plaintiffs read in evidence the certificate under or by means of which the defendants became a corporation above referred to; also the by-laws of the defendants, the 6th section whereof was as follows:

"It shall be the duty of the Secretary to keep the books and accounts of the Company, and make report of his doings to the stockholders at each annual meeting, and to the Trustees whenever called upon by them to do so. And he is empowered to

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make orders on the Treasurer for all moneys to be paid by the Company; and, in the prosecution of its business, may make, draw, indorse, and accept notes and bills of exchange."

In relation to the authority of the Secretary to accept the bills, the Secretary testified:

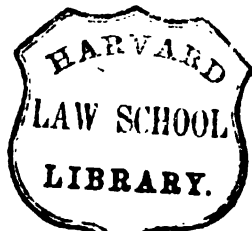
"Mr. Charles T. Shelton attended to the financial affairs of the defendants at the time of making those acceptances; he was at this time one of the Trustees, and he was acting as the general agent of the Company at that time; I do not know whether he was also President; it was my practice to accept drafts drawn on the Company, at that time and previously, by his directions; my acceptances as Secretary of the Empire Stone Dressing Company were generally recognized and paid by the Company; the defendants became insolvent about the time these drafts matured; I am not aware that any acceptances of mine as Secretary of the defendants were ever dishonored or repudiated by the defendants before their insolvency; when I was instructed by the Company, or its officers, to accept a draft, it was not my custom to inquire as to whether there was or was not a consideration; I am not aware that the defendants and the Quarry Company ever exchanged acceptances for their mutual accommodation." "I had, before this time, made accommodation acceptances for the Hartford County Quarry Company; these previous accommodation acceptances had not been paid by the defendants that I know of, but I suppose had been paid by the Hartford County Quarry Company, as I had no notice of their non-payment; we gave the Hartford County Quarry Company credit for their payment."

Charles T. Shelton testified on that subject:

"I remember telling Mr. Sherman to accept the drafts; * * * I told Sherman to accept them; I assumed it, and was a sort of king over both Companies."

There was much testimony to the effect that the bills were accepted, without consideration, for the accommodation of the drawers—some of which is stated in the opinion of the Court; and it was admitted that the \$500, found by the Referee to have been paid thereon, was received by the plaintiffs as a dividend from the drawers of the bills, and was paid by their Trustee.

The testimony of the plaintiffs' cashier showed that the bills were discounted by them for the drawers, and the proceeds passed



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to their credit and checked out as wanted, and that the drafts were, after such discount, forwarded by the plaintiffs to New York for acceptance. In relation to the plaintiffs' practice of discounting bills of exchange on New York which were not accepted, he said: "If we had a long acquaintance and full confidence in the drawer or the offerer, we took them without acceptance, trusting that they would be accepted."

It appeared that, by mistake, the payee of one of the drafts, Charles T. Shelton, did not indorse it until some months after the drafts were discounted and had become due; but, being requested to correct the error, he put his name upon the draft.

From the judgment entered on the Referee's decision for the plaintiffs, the defendants appealed.

Charles F. Sanford, for defendants, (appellants.)

I. The defendants never accepted either of the drafts, and can be charged with no liability upon either, except in the hands of a *bona fide* indorsee, for value, before maturity.

1. The act of Sherman, in accepting these drafts, was not within the scope of the authority conferred upon him by the by-law.

(a.) Special or limited powers are to be construed strictly. (*Stainer v. Tysen*, 3 Hill, 279.)

(b.) The act of Sherman, therefore, under consideration, was not only in excess of the authority conferred upon him by the by-law, but, as it involved a willful violation of duty, amounted, if not to forgery, at least to heinous fraud. (See argument in *Mechanics' Bank v. N. Y. & N. H. R. R.*, pp. 14, 19.)

2. If the delegated power had contained no express limitation, the act would have been a nullity, for the defendants themselves could not, under their charter, (*i. e.*, the General Manufacturing Law and their certificate of incorporation,) issue accommodation paper, for the purpose of enabling third parties to raise money thereon. (2 R. S., 596; *id.*, 657, 5th ed.; *Talmage v. Pell*, 3 Seld., 328; *Bank of Genesee v. Patchin Bank*, 3 Kern., 314.)

3. The attempted exercise of such a power is a violation of the Restraining Act. (*Attorney-General v. Life and Fire Ins. Co.*, 9 Paige, 470; *Schermerhorn v. Tulman*, 4 Kern., 140.)

4. Those who deal with an agent, acting under special powers, are chargeable with knowledge both as to the nature and extent

of the limitations prescribed. (*Atwood v. Munnings*, 7 B. & C., 278; *Tulmadge v. Pell*, 3 Seld., 328; *Stainer v. Tysen*, 3 Hill, 279; *Nixon v. Palmer*, 4 Seld., 398; *Alexander v. Mackenzie*, 6 M., Gr. & S., 766; *Mechanics' Bank v. N. Y. & N. H. R. R.*, 3 Kern., 599.)

5. *A fortiori*, if a corporation, the mere creature of legislation, transcends corporate powers, the dealer must be charged with notice, since, in such case, the limitations to its authority are not only defined in writing, but are matter of public law and public record. (*Bank of Genesee v. Patchin Bank*, *supra*; *Mechanics' Bank v. N. Y. & N. H. R. R.*, *supra*.)

6. The case of *The Farmers' and Mechanics' Bank v. The Butchers' and Drovers' Bank*, (16 N. Y. R., 125,) so far as it controverts these positions, is applicable solely to negotiable commercial paper, in the hands of *bona fide* indorsees for value, before maturity.

II. But the \$2,000 draft was not, at the time of its transfer, nor at any time during its life, a negotiable instrument. It was not indorsed by the payee till long after its maturity.

1. Prior to the Code, the transfer of a bill payable to order was only properly made by indorsement. In no other way could the transfer convey the legal title, so as to enable the holder to recover at law. (Story on Bills, § 201; *Gibson v. Minet*, 1 H. Bl., 605; 2 Story Eq., §§ 1036, 1037, 1044, 1047.)

2. In case of an assignment without indorsement, the holder acquired only the rights which he would have acquired upon the assignment of a bill not negotiable. (Story on Bills, § 201; 2 Story Eq., § 1047; *Murray v. Lylburn*, 2 John. Ch., 441; 2 Vern., 692; 1 Ves. Sen., 123.)

3. In such case the holder, having an equitable interest, might sue in the name of the person having the legal title. (*Pease v. Hirst*, 10 B. & C., 122; Chitty on Bills, 536.)

4. The Code has changed the law in this respect, so far as to permit the assignee to maintain the action in his own name, but as regards equitable defenses the law remains the same. (*Hastings v. McKinley*, 1 E. D. Smith, 273; Code, §§ 111, 112.)

5. The holder may, in certain instances, compel a payee, who transfers a bill without indorsing it, to indorse. (Story on Bills, § 201.)

6. But the object of such compulsory indorsement is to charge the assignor as indorser—not to give the holder, as against prior

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parties, any rights which the assignor, at the time of such compulsory indorsement, did not himself possess. (*Chitty on Bills*, 244, 246.)

7. An intended indorsee, when a bill has, by neglect, been transferred to him without indorsement, might, formerly, sue in the name of the payee. (*Chitty on Bills*, 536; *Pease v. Hirst*, *supra*; 5 Man. & Ryl., 88.)

8. Now, under the Code, as already suggested, he may sue in his own name, but, obviously, subject to all existing equities.

Thus, if the holder of a bill, by his negligence or mistake, fails to give due notice to an indorser, no court of equity will interfere to enforce his remedy; or if he lose his right against a surety, by failing to proceed against the principal, he will not be entitled, in equity, to any relief.

So, in the case of an intended indorsement by a payee, the Court, while it compels the indorsement, so as to give a right of action against the payee as indorser, thus enforcing a purely equitable right, will never interfere to exclude equitable defenses, but will leave the party to the just consequences of his negligence. (*Franklin Bank v. Raymond*, 3 Wend., 69; 13 Mass., 305.)

9. A voluntary indorsement, after maturity, is only equivalent to an assignment, and is made subject to all equities between the original parties. (*Williams v. Matthews*, 3 Cow., 252.)

10. As between the original parties, the want of consideration is a good defense. (*People v. Howell*, 4 Johns., 296; *Pearson v. Pearson*, 7 id., 26; *Schoonmaker v. Roosa*, 17 id., 301; *Slade v. Halstead*, 7 Cow., 322; *Bank of Troy v. Topping*, 9 Wend., 273; *Franklin Bank v. Raymond*, *supra*.)

III. The acceptance of the \$500 draft is not, and does not, on its face, purport to be, the act of the defendants. In this respect it differs from the other, which is accepted in the defendants' name. Upon this draft, George Sherman is the acceptor, and he alone is liable as such. The word "Secy.," appended to his signature, is merely *descriptio personæ*. (*Hills v. Bannister*, 8 Cow., 81; *Taft v. Brewster*, 9 Johns., 334; *Stackpole v. Arnold*, 11 Mass., 27; *Pentz v. Stanton*, 10 Wend., 271; *Barker v. Mech. Fire Ins. Co.*, 3 id., 94; *Moss v. Livingston*, 4 Comst., 208; *De Witt v. Barley*, 5 Seld., 371; *Bolles v. Walton*, 2 E. D. Smith, 164.)

IV. The plaintiffs are not *bona fide* indorsees for value of either acceptance.

1. The defendants having shown that neither the Quarry Company nor Shelton could have recovered upon the drafts, for the reasons above urged, the burden of proof was thrown upon the plaintiffs to show that they parted with value, in the regular course of business, before the maturity of the drafts, and on the faith of the acceptances.

2. Again, the drafts were respectively discounted on or about the day of their date, and were subsequently forwarded to New York for acceptance. The plaintiffs, therefore, if they parted with value at all, did so on the faith of the drawer's responsibility, not on that of the acceptor's.

The judgment should be reversed, and judgment rendered for defendants, since the plaintiffs can derive no advantage from a new trial.

William E. Curtis, for plaintiffs, (respondents.)

I. The acceptances were not accommodation. The failure of the defendants to produce and show the general account between the companies where these drafts are charged, and the character of their transactions appears, establish the presumption that the acceptances were made in their ordinary course of dealings, either as payments or advances for stone quarried and delivered, or to be quarried or delivered.

1. The act of Sherman in accepting these drafts was within the scope of his authority, as represented and recognized by the defendants in their dealings with third parties, and as established by by-laws. (*The United States v. The City Bank of Columbus*, 19 How. U. S. R., 385.)

II. If, for the purposes of the argument, it is conceded that defendants' secretary exceeded his authority, and that the drafts were accommodation drafts, the plaintiffs having discounted the same in the ordinary course of business before maturity, and without notice, come within the rule, that as between two innocent parties thus situated, the principals in whose name the drafts were accepted, rather than the holder of the drafts, should suffer for their misplaced confidence.

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The same principle applies to the acts of the officers of a corporation as to a partner of a mercantile firm who affixes the firm name to a paper in which the firm has no interest. Where such paper is negotiable, and passes to an innocent holder for a valuable consideration, the corporation is bound, and doubly so, when by their conduct they have also induced the party to take it (*The Bank of Genesee v. The Patchin Bank*, 3 Kern., 315-317; *Attorney-General v. The Life and Fire Ins. Co.*, 9 Paige, 470; *Belmont v. Coleman*, 1 Bosw., 188; *Storey v. A. M. Life Ins. Co.*, 11 Paige, 636; *Mechanics' Bank v. N. Y. & N. H. R. R.*, 3 Kern., 622, 626; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. R., 125; *Exchange Bank v. Monteith*, 17 Barb., 171.)

III. The plaintiffs do not hold the \$2,000 draft subject to the equities affecting it in hands of the indorser, by reason of his omitting to indorse it at the time of the transfer.

The subsequent indorsement has relation back to the time of the delivery of the bill, and was sufficient to give effect to the antecedent right that vested at the times when the consideration was paid. (*Chitty on Bills*, 8 Am. ed., 263; *Story on Bills*, § 201; *Anon.*, 1 Camp., 492; *Watkins v. Maule*, 2 Jacob & Walker, 244.)

BY THE COURT—WOODRUFF, J. The defendants are a corporation organized under the General Manufacturing Law of this State, passed in 1848. (Sess. Laws of 1848, ch. 40, p. 54.)

They are sued upon two bills of exchange drawn upon them by the Hartford Quarry Company, and which were in terms accepted by the defendants' Secretary.

It is expressly found by the Referee that "neither of the said acceptances was made in the prosecution of the business of the defendants, but solely for the accommodation of the drawers, and that the defendants never received any consideration for such acceptances."

This finding is in clear conformity to the weight of the evidence. The Secretary of the defendants, by whom the acceptance was written, and whose duty it was to keep their books and accounts, testifies that so far as he knows there was no consideration for the acceptance; that it was his impression at the time that the acceptances were made for the accommodation of the drawers solely;

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that no consideration passed from any one to him, or to the defendants, so far as he knows; that although he cannot testify that he knows, of his own knowledge, that they were without consideration and accepted for the accommodation of the Hartford Quarry Company, that is his impression and belief. And it having been suggested that the defendants had accepted drafts in payment for stone shipped to them by the Quarry Company, and this being indeed the only consideration which it was claimed by the plaintiffs the defendants had received, the Secretary testifies of his own knowledge that "they were not made for stone." The President of the Hartford Quarry Company, (the drawers,) who was also the chief manager and agent of the defendants, and who told the Secretary to accept the bills, testifies in explicit terms that they were accepted for the accommodation of the Quarry Company.

The Treasurer of the defendants testifies that at a date prior to the date of these bills he was chosen Treasurer, and from that time until long after the maturity of the bills he had the sole management of the financial affairs of the defendants, and that he did not as Treasurer, or in any way, receive any consideration for the acceptances, and that the Company did not to his knowledge.

There is no testimony in contradiction of this evidence. The only testimony which in any degree tends to show consideration, is that of Julius H. Pratt, a Director of the Quarry Company and a Trustee of the defendants. He knows the general fact that the Quarry Company sent stone to the defendants, but his testimony is chiefly hearsay. He says in terms he does not know what was the consideration of these acceptances. He says he did not know what was the state of the accounts between the two Companies in the spring of 1854, and he adds that he does "not think anybody did."

The finding of the Referee on this point is therefore in accordance with the proofs. The acceptances were without consideration and for the accommodation of the Hartford Quarry Company.

The Secretary of the defendants had no authority to accept for the accommodation of third parties. The by-laws authorized him "to accept bills of exchange in the prosecution of the business of the Company." That business was "the business of cut-

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ting, sawing and dressing stone of all kinds and the business of stone cutting in all its branches."

It may perhaps be conceded that the certificate of incorporation, under the clause last quoted, would authorize the purchase of stone to be cut or dressed, and then that the by-law would authorize the Secretary to accept bills in payment for stone purchased. But no latitude of construction would extend the authority conferred in the language above cited, so as to include an authority to accept for accommodation merely and without any consideration.

The Agent or Manager of the Company, who was a Trustee and had been President, told him to accept the bills, but the evidence fails to show that either he or such Agent or President or both had any authority to bind the defendants by such an acceptance.

If the report of the Referee that "the defendants duly accepted the bills," is to be taken as importing that the Secretary had authority to accept accommodation bills, then his report is in this respect against the weight of the evidence and the judgment should be reversed on that ground, unless we can now hold upon the other facts that the defendants are liable whether the Secretary was authorized to accept such bills or not, and alike liable in either case.

If the report is not to be taken to find such authority, then there is no finding on the point, and a new trial should be granted because enough is not found to sustain the judgment, unless, as before, we are prepared to say that the question whether he had authority or not is immaterial and the defendants are liable, although the Secretary was not authorized to accept these bills.

This, I apprehend, cannot be correctly held. On the contrary the right of the plaintiff, in my judgment, depends primarily upon the question, whether the Secretary of the defendants had authority to accept bills for the accommodation of a third party. If he had, then the plaintiffs are doubtless entitled to recover. And when this case was before the General Term in January, 1858, there was an express finding by the Referee that the Secretary of the defendants was "duly authorized" to accept these bills. If that were true as matter of fact, the cases which hold that an accommodation acceptor, whose acceptance is given with-

out restriction as to its use, and especially where it is given for the very purpose of securing a third party, is bound thereby, would apply to this case.

It is, however, obvious that a finding that the Secretary was "*duly*" authorized to accept accommodation bills involves the legal proposition that the Secretary of a manufacturing corporation may be duly authorized to accept accommodation paper, that the corporation have legal power to make such an acceptance, and that all things had been done which are requisite to confer such legal authority on the Secretary.

Although it may be true that a corporation having an authority to accept for the purposes of its business may exceed their legitimate power and so accept that as against a third person relying on the representations of its agents, or advancing money on the faith of the acceptance, it will not be permitted to allege the true character of the acceptance to defeat a recovery, still it is, we think, quite clear that neither the Secretary of a manufacturing corporation, nor any or all of its officers have, as matter of law, any legal authority so to accept; and that in this case under the charter, or the general principles applicable to the subject, the Secretary of the defendants had no such authority; and if not, then the question will arise whether he was clothed with such authority to accept for the purposes of the Company that a third person had a right to rely upon his act of acceptance without further inquiry, and by advancing money or giving credit on the faith thereof without notice that the bill was an accommodation bill, would become entitled to hold the Company, notwithstanding the Secretary had no legal authority from the defendants to accept accommodation bills. And if this last question be answered affirmatively, then are these plaintiffs *bona fide* holders without notice that the bills in question were accommodation bills, who have given value therefor upon the credit of the acceptance and in reliance upon the apparent authority of the Secretary.

1. Upon the first question the evidence is clear, and it has already been sufficiently noticed. The by-law, under which alone the Secretary had actual authority to accept any bills, confined such authority to the prosecution of the business of the Company. There was no evidence that the powers of the Sec-

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retary had been enlarged by any other means. Although the Secretary states that it is his impression that he had previously made accommodation acceptances for the drawers of these bills, he also states that they were paid, as he supposes, by the drawers and not by the defendants, and if a previous practice of giving out such acceptances would bind the Company to a person who received them for value without notice, it is not shown that the Trustees of this Company ever sanctioned any such practice.

The Referee finds that the present acceptances were not made in the prosecution of the business of the defendants. It must be adjudged, I think, that they were made by the Secretary without authority.

2. Would these acceptances by the Secretary bind the Company in favor of a *bona fide* holder of the bills for value paid upon the faith of the acceptances, and in reliance upon any apparent authority of such Secretary to bind the defendants.

In the *Bank of Genesee v. The Patchin Bank*, (3 Kern., 309,) the action was against the defendants as indorsers of a bill of exchange discounted by the plaintiffs. And it appeared on the trial that the indorsement was by the cashier of the defendants for the accommodation of a third party, (a Railroad Company;) that the defendants had no interest in the bill which was so indorsed. It however appeared that in that case the proceeds of the discounted bill were sent by the plaintiffs to the defendants' cashier from whom the bill was received for discount.

The Court of Appeals unanimously held that a charge to the jury, that "if the cashier had special authority from the Patchin Bank, or from the Manager of the Bank, to indorse the draft in question, the Bank was bound by it, although it was an accommodation indorsement for the Railroad Company, and the bill was made to raise money for it," was erroneous and the judgment below was reversed for that error.

Mr. Justice DENIO expressed the opinion that had the charge annexed a further condition that, "the plaintiffs had received and discounted the bill under a representation of the defendant that it was the owner of the bill and that it was to be discounted for the defendants' benefit," the charge would have been correct, but the other Judges declined passing upon that question.

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That case, therefore, leaves it quite doubtful at least whether any or all of the agents of a corporation can bind such corporation, whose business is limited to the purposes of banking or of manufacturing, by an accommodation indorsement or acceptance made for purposes not within the scope of that business.

It is requiring very little of one who deals with a corporation having limited powers, to inquire whether the acts upon which he relies are within the scope of those powers; and I cannot think that a manufacturing corporation has such an unqualified authority to make promissory notes, or draw, indorse or accept bills of exchange, that a third party may without inquiry rely upon their drawing, indorsement or acceptance, and claim to be regarded as a *bona fide* holder for value, protected against any inquiry into the consideration thereof, or into the actual authority of the officer or agent; or whether in truth the note or bill is issued for the proper purposes of the corporation. (*Central Bank v. Empire Stone Dressing Co.*, 26 Barb., 23.)

I do not think it necessary to pursue this question, for if the plaintiffs are not *bona fide* holders for value paid in reliance upon the defendants' acceptance, and in faith that the Secretary had authority to accept, then upon the case cited, it is certain they are not entitled to recover. On the subsequent trial of the case of *The Bank of Genesee v. The Patchin Bank*, and on a second review thereof in the Court of Appeals, it was held, as we are informed, that the discount of the bill by the plaintiffs on the application of the defendants' cashier, and the sending of the proceeds of the discount to the defendants upon the representation that the defendants desired the discount for their own benefit, or in substance to that effect, and without any notice that the discount was for the benefit of a third party, made the plaintiffs *bona fide* holders for value entitled to recover. That having a general power to procure notes held by them discounted and to indorse them for that purpose, the defendants would not, after having made application therefor, obtained the discount and received the money, be permitted to allege as a defense that in truth the discount was procured for another.¹

3. In regard to the claim of the plaintiffs to be *bona fide* holders for value, it should be borne in mind that to entitle one to enforce

¹ Since reported, 19 N. Y. R., 312.

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an indorsement or an acceptance (which is otherwise invalid) on the ground that he is a *bona fide* holder for value, it must appear that he parted with value upon the faith of such indorsement or acceptance. He may be a *bona fide* holder of the bill for value paid therefor, and be entitled to enforce it against every other party thereto, and yet have no right to recover on such indorsement or acceptance.

This distinction is applicable to the present case, and defines the plaintiffs' relation to the bills here in question. They are *bona fide* holders of the bills for value paid therefor to the drawers, and as to such drawers they have a plain right to recover from them the full amount.

But they have paid nothing in reliance on the defendants' acceptance. The bills were discounted before they were accepted, and upon such discount the proceeds were placed to the credit of the drawers, and made subject to their checks, and the bills themselves became the property of the plaintiffs.

At that time there was no acceptance upon which the plaintiffs did or could rely. They were therefore not discounted upon the faith of the acceptances at all.

At the moment when the defendants' Secretary accepted the bills they were the plaintiff's property, and they were the immediate parties to the contract which, without consideration and without authority, the Secretary assumed to make.

The plaintiffs no doubt discounted the bills with an expectation that they would be accepted, but they can in no just sense be said to have discounted the bills in reliance upon an acceptance which had not then been made.

They may have been induced to believe that the bills would be accepted by the fact that they had held similar drafts which were accepted, and may have had the assurance of the drawer that they would be accepted. But relying upon their previous experience, or relying upon such an assurance, is by no means discounting the bills on the faith of the acceptances.

It is not shown that any one who had authority from the defendants, gave them an assurance that the bills would be accepted. And if it had been shown that Charles T. Shelton, the defendants' Agent and former President, had given the plaintiffs an unconditional promise that the bills should be accepted,

the defendants would not have been bound, not merely because he had no authority to bind the defendants by such a promise, but especially because by our statute an acceptance must be in writing before it becomes binding as an acceptance, and an unconditional promise to accept must also be in writing in order to bind the drawee of a bill. (1 R. S., 768, §§ 6-8.)

It is suggested that the plaintiffs would have caused the bills to be protested for non-acceptance, and have had immediate recourse to the drawers, if the defendants' Secretary had not written an acceptance on the bills; and that, relying on the act of the Secretary, they have omitted such protest and have waited until the bills became due before proceeding against the drawers; and that this delay is equivalent to discounting the bill or paying value in reliance on the acceptance. This claim is as ingenious as I think it is novel.

If any fraud was practised on the plaintiffs to lull them into an unwarranted security they may have recourse to the individuals who practised such fraud. But the defendants are not to be held by the unauthorized act of their Secretary merely because the plaintiffs, but for such act, would have sought earlier redress.

As above suggested the plaintiffs had already become the holders of the bills, and when the alleged acceptance was written it was an act to which the plaintiffs were direct and immediate parties. They were not bound to take an unauthorized acceptance; and they should have seen to it that the acceptance if given was authorized and was an act to which the agents of the defendants could bind them.

It is proper to observe that when the case was before the General Term of the Court on a former occasion, there was not only a finding that the Secretary had actual authority to accept the bills, but much stress was also placed upon the want of clear proof that these bills were in truth accommodation bills for which the defendants had received no consideration, and also on the circumstance that the accounts between the drawers and the defendants were not produced. On the present trial it was proved without objection that in proceedings in insolvency relating to the settlement of the affairs of the drawers of the bills it was found that the drawers were indebted to the defendants. This may perhaps be deemed to strengthen the other proofs,

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already adverted to, that the bills were accommodation bills. At all events, the finding of the Referee on that point cannot be disregarded or be deemed against the evidence when as it now appears it is so fully sustained.

The judgment should, I think, be reversed, and a new trial ordered, costs to abide the event.

Ordered accordingly.

THIS action was again tried on the 14th of February, 1861. On the second trial, which was had before Mr. Justice WOODRUFF, it appeared that the bill for \$500 was discounted and the money paid over to the drawers before it was accepted, and in conformity with the foregoing decision the jury were instructed that the plaintiffs could not recover thereon. But in relation to the bill for \$2,000, evidence was given and the jury found that, although it was received by the plaintiffs from the drawers, and passed through the form of a discount before its acceptance, this was done under an express agreement that the plaintiffs should not pay over the money unless, nor until after the bill was accepted, and that the money was not paid to the drawer until after the acceptance. Upon this ground and the good faith of the plaintiffs in taking the bill, and in paying over the money on the faith of the acceptance, without notice that the bill was an accommodation bill, or not drawn in the usual course of business, for value, and in the proper business of the defendants, or of other want of authority in the Secretary to accept, the plaintiffs had a verdict for the amount of the \$2,000 bill, less the dividend received thereon from the drawers.

CHARLES THOMSON, Plaintiff and Respondent, v. THE SIXPENNY SAVINGS BANK, of the City of New York, Defendants and Appellants.

A corporation was created for the purpose of receiving on deposit sums offered therefor by mariners, tradesmen, clerks, mechanics, laborers, minors, servants and others, and investing the same in State or city stocks or bonds, or loaning the same on such securities, or on bond and mortgage on real estate, for the use and advantage of the depositors; the business of the corporation to be managed by a Board of Trustees, who were authorized to appoint a President and two Vice-Presidents; and power was given to hold only such real estate as was necessary for the transaction of its business, and such as should be purchased at sales upon judgments or decrees obtained for money so loaned, and the corporation was prohibited dealing in or buying or selling any goods, wares or merchandise. The by-laws provided for monthly meetings of the Trustees, and conferred the superintendence and management upon seven Trustees during the interval. Upon the foreclosure of a mortgage, held by such corporation, upon a manufactory, and a sale of the mortgaged premises, the corporation became the purchaser. Thereafter, and after the corporation had taken possession, one of the Vice-Presidents, without the authority of the Trustees, forbade the removal of certain tools and machinery therefrom by the purchaser thereof under a sale by virtue of a mortgage upon such tools and machinery, alleging that, as to any of the articles which were fixtures, they were the property of the corporation, and declining to specify which he claimed to be fixtures, until consultation could be had for the purpose of ascertaining which were in law fixtures passing to the corporation under the first named foreclosure sale.

1. *Held*: That if the act of the Vice-President was such as to amount to a tortious conversion of the tools, the corporation was not liable for his acts.
2. Proof that he acted by the authority and sanction of the President would not be sufficient to subject the corporation to such liability.
3. A subsequent demand of the property being made of the Vice-President at the place of his private business, he replied that he would lay the matter before the Trustees of the corporation: *Held*, that this did not render the corporation liable as for a refusal to permit the plaintiff to take his property.
4. Whether, if the action had been against such Vice-President as an individual, his statement at the time he prohibited the removal, that he only claimed to detain such tools as were fixtures, and as such belonged to the

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corporation, would have justified him in forbidding the removal of any tools until the question which were fixtures was determined, or would have been a defense? *Quære*.

5. And whether the subsequent consent of the plaintiff to refer the question, which were fixtures, to the counsel for the respective parties, and to abide by their decision, was not a waiver of any such previous wrong, if any? *Quære*.
6. How far a qualified refusal to deliver on demand is to be taken as evidence of conversion considered.

(Before WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, February 18; decided, October 29, 1859.

APPEAL from a judgment rendered on a verdict for the plaintiff, for \$4,801.80 damages and costs.

The complaint alleged the incorporation of the defendants, the plaintiff's ownership of four drilling machines, eight engine lathes, three planing machines, one steam engine, and other machines and tools of the value of \$8,000; that the defendants, on, &c., became possessed thereof, and have refused to deliver the same to the plaintiff, but on the contrary have converted and disposed thereof to their own use; and demanded damages for such wrongful conversion and disposition of the property.

The answer denied all these allegations, and stated that the articles were and are in a certain building specified; that the defendants never have made, and do not make, any claim to the said articles; and the defendants in the answer offered to deliver the same to the plaintiff.

On the trial the proofs showed that the defendants, upon the foreclosure of a mortgage, given by Sloan & Leggett, held by them upon the building or manufactory in which the property was in use, became the purchasers of the building; that there was then outstanding a mortgage given by the same parties (Sloan & Leggett) upon the chattels now in question; that such last named mortgage was foreclosed by a sale of the chattels at auction on the 30th January, 1857, by the mortgagee, in pursuance of a power contained therein, and at such sale the plaintiff purchased the articles mentioned in the complaint.

At the sale of the mortgaged chattels, William Miles, the Vice-President of the defendants, was present. The sale took place on

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the premises. He was there professing to act for the defendants as owners of the manufactory. When the auctioneer was about to sell the mortgaged chattels, Mr. Miles, according to the testimony of some of the witnesses, forbade the sale; according to some of the testimony, he forbade the sale of any of the articles which were fixtures, and according to other testimony he forbade the sale of anything belonging to the defendants; but being called on to state which articles he claimed to be fixtures, or to belong to the defendants, he declined doing so at that time. The sale proceeded, and the plaintiff became the purchaser of the articles in question, and Miles instructed the person in charge of the building not to allow the removal of any of the articles until it was ascertained which belonged to the defendants.

There was evidence that, immediately after the sale, the plaintiff and Miles agreed to refer the question which, if any, of the articles were fixtures belonging to the defendants to their respective attorneys, who should meet at the building two days thereafter, and to abide by their decision or opinion. Several days elapsed, and the attorneys not having so met, the plaintiff sent a messenger on the 9th of February to the store (or place of private business) of the said Miles, and made a written demand of the chattels, to which he replied that he would lay it before the Board of Trustees of the Bank. A like demand was also made of the person whom Miles had instructed to detain the articles, and his answer was, that he was instructed not to deliver the articles. The President being called upon, referred the plaintiff to the Vice-President.

There was evidence tending to show that, after this, and before suit brought, the attorney for the defendants stated to the plaintiff's attorney, at an interview between them, that the defendants had no objection to his taking the articles. After suit brought, the defendants' attorney, in writing, declared to the plaintiff's attorney that the defendants made no claim to the articles mentioned in the complaint, and did not and had not refused to deliver them.

There was some conflict of testimony; and the opinion of the Court refers to some of the evidence, which it is not necessary here to repeat.

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The opinion also states the provisions of the defendants' charter defining the object of the incorporation. It further declared the purpose to be, the investment of the moneys deposited in State or city stocks or bonds, or loaning them on such securities, or on bond and mortgage, for the benefit of the depositors, and authorized the corporation to purchase, on foreclosure or on sales on judgments, the real estate sold.

The 16th of their by-laws provided as follows:

"A monthly Attending Committee of seven Trustees shall be appointed, whose duty shall be to attend at the Bank during the month, when necessary, and to have the general superintendence and management of it during the recess of the Board. They shall keep minutes of their proceedings, and lay them before the Board of Trustees at each monthly meeting, noting particularly the amount deposited and drawn out."

There was no evidence defining the powers of the President; and the proof in relation to the Vice-President only showed that he was to act in the absence of the President.

The requests of the defendants' counsel for special instructions to the jury, and the charge as given, are sufficiently stated in the opinion of the Court.

The jury rendered a verdict for the plaintiff for \$4,623 damages; and for that sum, and for \$178.80 costs, judgment was entered, from which the defendants appealed.

Charles T. Cromwell, for defendants, (appellants.)

I. The defendant has no corporate power other than express trust powers, which are confined (§ 6 of act) to receiving deposits from laborers, minors, mechanics and others, of five cents and over, and investing the funds deposited. It cannot be forced to take personal property, which it is expressly prohibited from taking, or from selling after it is taken, nor can it, therefore, be made liable in damages for a tort, because the enforcements of such liabilities would necessarily work a breach of trust, to the injury of its *cestui que trusts*, for it would be directly taking from those laborers, minors, and mechanics, the amount of this judgment, and forcing upon it an investment of that amount in old rusty tools; and such liability would force on the corporation a direct violation of its act of incorporation, which positively pro-

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hibits it from "directly or indirectly dealing or trading in, buying or selling any goods, wares or merchandise." (Laws of 1853, 670; *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow., 678; *McCullough v. Moss*, 5 Denio, 567, overruling 5 Hill, 137; 2 Denio, 110.)

II. The trespass complained of was not authorized by the defendant. No express authority was shown, nor were the acts of Miles within the scope, actual or apparent, of his agency as an officer of the Bank. His duties, by the charter and its by-laws, are restricted simply to preside at the Board in the absence of the President. The defendant, therefore, cannot be made liable for Miles' acts, especially if they were tortious. (*Wright v. Wilcox*, 19 Wend., 345; *National Bank v. Norton*, 1 Hill, 572; *Vanderbilt v. The Richmond Turnpike Co.*, 2 Comst., 479, and cases cited; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 8 Kern., 633; *Weed v. Panama R. R.*, 17 N. Y., 362; *Philadelphia R. R. v. Derby*, 14 How. U. S., 468; Story on Bailments, § 400, *et seq.*; 5 Denio, 567; 2 *id.*, 110.)

III. The third proposition of the charge to which the plaintiff excepted was erroneous, and calculated to mislead the jury.

1. There was not any evidence tending to prove that the Trustees had any knowledge of, or that they in any manner sanctioned, the acts of Miles complained of.

2. The President had no power, by virtue of his office, to sanction or authorize such acts, and no express authority was shown; on the contrary, the existence of such a power was negatived, and the plaintiff was expressly notified of this absence of authority. (See 16th by-law, also act of incorporation.)

3. If the President was vested with such a power he could not delegate it to another. (Paley's Agency, by Dunlap, 175, and *n. A.*; 2 Kent's Com., 613; *Lyon v. Jerome*, per VERPLANCK, Sen., 26 Wend., 485; *Com. Bank v. Norton*, 1 Hill, 501.)

4. The President did not, in fact, assume to confer any such power.

IV. The Court also erred in refusing to charge as requested, that the proof was insufficient to make out a conversion, and in its instructions to the jury on these points.

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1. As to the occurrence at the sale. The articles were on the defendants' premises, had been there, and used there since its erection, were there at the foreclosure sale through which defendants acquired title to the premises. The plaintiff had no legal right to enter defendants' premises to take them away, or to require any action on the part of the defendants to put him in possession of them. (*Wilde v. Waters*, 32 Law and Eq. R., 422; *Colgrave v. Dias Santos*, 2 B. & C., 76; *Mount v. Derick*, 5 Hill, 455, and cases cited.)

2. Mr. Miles asserted no title in the defendants, but in good faith merely requested time to ascertain to whom they belonged. The articles were part of them in the nature of fixtures, and had been used in and with the building ever since its erection. There was every ground to doubt whether they belonged to the assignees, to plaintiff, or to defendants, and which articles belonged to either. The plaintiff was a stranger, and had shown no right to the goods. (Cases *supra*, and *Beckley v. Howard*, 3 Brev. S. C., 94; *Parkinson v. Simmons*, 2 McMullen S. C., 188; *Solomons v. Dawes*, 1 Esp., 83; *Wilbraham v. Snow*, 2 Saund., 47, d. e. f., and cases cited inf.)

3. The plaintiff consented to give time, and thus waived all right founded upon what had previously occurred.

4. The right of the plaintiff thus rested solely on the alleged demand and refusal.

5. As to this, the ruling of the Court was to this effect:

(a.) That Miles' answer in law was a refusal, thus taking from the jury the consideration of the evidence whether it amounted to a conversion or not.

(b.) And that if the jury believed a demand had in fact been made, a conversion had been made out.

6. This was manifestly erroneous.

(a.) It submitted nothing to the jury. It left nothing for the jury to determine.

(b.) Miles' answer was simply a declaration of his want of authority to refuse. (5 Hill, 204, 406, and others, *supra*; *Green v. Dunn*, 3 Camp., 215; *Isaac v. Clark*, 2 Bols., 312; *Severin v. Kerpell*, 4 Esp., 156; *Foulds v. Willoughby*, 8 Mee. & W., 440; *Hayward v. Seaward*, 1 Moore & Scott, 459; *Watt v. Potter*, 2 Mason, 80; *Yale v. Saunders*, 16 Vt., 243; *Anon.*, 2 Show, 161;

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Alexander v. Southey, 5 Barn. & Ald., 247; Bull, N. P., 446; 2 Denio, 643; 10 R., 56; *Mires v. Solebay*, 2 Mod., 244; *Pothonier v. Dawson*, 1 Holt C., 383.

(c) A refusal to deliver a chattel which is on the defendants' premises, unaccompanied by a positive denial of the plaintiff's right to it, or an assertion of dominion over it by the defendant, is not evidence of a conversion. (32 Eng. L. and Eq., *supra*; 1 Esp., 83; 2 Mason, 77-81; 2 Denio, 643, and cases, *supra*.)

A fortiori, it is not, in the language of the charge, conclusive evidence.

V. The demand and refusal did not prove a conversion, for other reasons:

1. It was not made at the proper place. It should have been made at the Bank, and of the committee in charge there.

2. The articles in question were not in the possession of the defendants when the demand was made.

3. A sufficient excuse was shown for not complying with it.

VI. The offer to deliver the goods before the commencement of the action was a bar to a recovery by the plaintiff. (1 M. & S., 459, and other cases, *supra*.)

VII. The question of conversion is one eminently for the jury, and it was error not to have submitted the question, whether the testimony amounted to a conversion or not, to the jury. The conversion was adjudged by the Court before the submission to the jury, and nothing was left for them to find but the value of the tools. (*Watt v. Potter*, 2 Mass., 80, and others, *supra*.)

VIII. A qualified refusal is no evidence of conversion. The refusal here, if what took place amounted to that, which we deny, was qualified, and therefore was no conversion. (*Green v. Dunn*, 3 Camp., 215, and others, *supra*.)

IX. There is no evidence showing any authority in Nicholls to make a demand, and such authority cannot be inferred, but must be proved. (*Right v. Cuthell*, 5 East, 498; *Guntton v. Nurse*, 2 Brod. & Bing., 447.)

Nor is it anywhere shown that Nicholls communicated to the plaintiff what occurred between him and Miles upon the delivery

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of the plaintiff's letter. No pretense of ratification by plaintiff of Nicholls' acts can, therefore, be presumed.

X. If the property of plaintiff was in the custody or under the control of the defendant, a corporation, as was certainly plaintiff's view of the case, from the direction of the notice, trover will not lie, unless it be affirmatively shown that Miles had authority to respond to the demand, by making or directing a delivery of the goods. This is not only not proved, but the converse is clearly shown. The corporation could only act by its Board of Managers, and Miles gave the only response that he could, viz.: that he would invoke the authority of the Board; and it is nowhere shown that such authority had been invoked, or that the Board had ever been convened, or had notice of the alleged demand. Time should have been allowed for the Board to refuse, before it could be said the defendants refused. *Hill v. Covell*, (1 Comst., 522,) settles that a conversion must be tortious, and that a compliance with a demand must be possible. It was not possible for Miles to comply.

XI. The question of title, &c., had been mutually submitted to the arbitrament of the counsel of the respective parties, and until their determination of the matter in controversy the action was premature, and what occurred at Livingston's office may be considered as an award. (*Hays v. Hays*, 28 Wend., 363.)

XII. The proceedings on the part of plaintiff and his attorney show a predetermination and a scheme to impose an action on the defendants, and to coerce them into the position of purchasers of the old rubbish for which the suit is brought.

XIII. There being no questions raised as to the answer on the trial, none can be now raised. (*Belknap v. Sealey*, 14 N. Y. R., 148.)

XIV. There should have been a nonsuit, as requested.

XV. The Court erred in refusing to charge as requested, and in charging as it did.

John E. Parsons, for plaintiff, (respondent.

I. An action of trover will lie against a corporation, and this, though the conversion be of property, to deal in which is not the business of the corporation. (*Yarborough v. The Bank of Eng-*

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land, 16 East R., 6; *Beach v. The Fulton Bank*, 7 Cow.-R., 485; trover for flour and lard; *The Bank of Columbia v. Patterson, Admr.*, 7 Cranch, 299; *Foster v. The Essex Bank*, 17 Mass., 503.)

II. The plaintiff, before resting his case, offered evidence from which the jury might properly infer that the defendants authorized the act of Mr. Miles in refusing to permit the plaintiff to remove his goods at the time of the sale, and in refusing the written demand made upon him; the act of Mr. Purly, the President of the Bank, in the refusal made by him; and also authorized the act of Mr. Leggett in refusing the demand made upon him. Either of those acts amounted to a conversion, and the motion to dismiss the plaintiff's complaint was therefore properly denied.

1. The defendants had, on January 15, 1857, purchased the building in which was the plaintiff's property, and they owned that building at all the times mentioned. They took the position that the plaintiff's property was in the nature of fixtures, and belonged to the realty. The Bank, therefore, intended to have the benefit of the property, and to their use was it converted. They themselves have offered some testimony tending to show its actual use by them, or their assumption of beneficial ownership of it through the person in charge for them of the building.

2. The property was in the possession of the defendants. The defendants could only act in reference to it by its agents. The building, which did belong to the defendants, was so used as to deprive the plaintiff of his property. The plaintiff could only make a demand on the defendants by a demand made on the defendants' agents. He made his demand upon the President, who expressly stated that "the Bank" (the defendants) claimed the property, and himself refused to permit a delivery of it—referring the plaintiff to Mr. Miles, the Vice-President; upon Mr. Miles, who refused, and who, by making an appointment between the attorneys of the parties to determine the ownership of the property in question, as between the Bank and the plaintiff, proved that the Bank claimed the property as its own, and upon the person in charge of the building, who refused under instructions, as the defendants proved by his own testimony, from

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Mr. Miles and Mr. Cromwell, a Trustee, and the attorney of the Bank, if not from the Trustees themselves.

8. The refusal by Mr. Miles and Mr. Leggett to the written demand was made after numerous interviews with, and on advice from Mr. Cromwell, the attorney of the Bank, and the defendants' counsel in this very action, and Mr. Purdy, the President of the Bank.

4. The plaintiff was not bound to show any express authority from the Bank to its agents to convert his property. Specific authority to commit a tort is an absurdity. The building and its contents were in the charge of Samuel Leggett, appointed by the Bank to take charge of them. His acts in respect to such property were the acts of the Bank. But he acted on direct authority from the executive officers of the Bank.

5. Mr. Miles was specially authorized to act in respect to this property. Mr. Purdy, the President of the Bank, was also an assignee of Sloan & Leggett; as such represented an interest possibly conflicting with that of the Bank, and therefore refused to act in the premises, authorizing Mr. Miles to act in his stead.

6. The sale took place on January 30, 1857. On the following morning Mr. Miles saw and advised in the matter with Mr. Cromwell. He saw and advised several times with Mr. Purdy, the President of the Bank, before the written demand was made. Mr. Vandewater, one of the Trustees, by the request of the President, was present at, had notice of, and tacitly sanctioned Mr. Miles' acts at the sale. On the first Monday in February, 1857, there was a meeting of the Trustees. Subsequently, Mr. Cromwell, the regular attorney of the Bank, had the matter of the plaintiff's claim in charge. Mr. Miles says that he acted to protect the interests of the Bank. The plaintiff was urgent for an immediate answer, and delayed two weeks before insisting upon the conversion. Surely, from all these circumstances, there was some evidence to go to the jury.

III. The Court properly refused to charge the first two propositions of the defendants' counsel. It was properly left to the jury to say whether Mr. Miles was empowered to commit the trover, and whether the general authority to manage the affairs of the Bank in the absence of the President, embraced such power. The question of authority is a question of fact.

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IV. The defendants produced in evidence their by-laws. The duties of the officers were neither defined nor restricted therein. The President, therefore, in the intervals between the meetings of the Trustees, as the chief executive officer of the defendants, and in his absence, (or, what is equivalent, inability, neglect or refusal to act,) the Vice-President had general charge of their affairs. The defendants were the owners of the building in which was the plaintiff's property; the disposition of that property was an incident to such ownership, and the President or Vice-President, therefore, were the properly constituted agents of the defendants in respect thereto. The Court, therefore, properly left it for the jury to say whether Miles was acting with the authority and sanction of the President or of the Trustees, and charged that if he was, his conduct at the sale amounted to a conversion. There was no conflict of evidence as to his acts. His own testimony shows that he directed Leggett, after the demand made on him, to prevent the removal of the plaintiff's property by force.

V. The owner of property is entitled to absolute and entire possession and control of such property at all times. Whoever usurps that control, does so at his peril; and it is no defense that he acted in good faith, honestly questioning the ownership of such owner. The jury have found that Mr. Miles' acts were the acts of the Bank. He was therefore required to give an immediate answer when the demand was made upon him, both on January 30th, at the sale, and on February 9th, when the written demand was served. He refused the demand, and Mr. Leggett, on his instructions, prevented the removal by the plaintiff of his property. This perfected the conversion, and the Court therefore properly refused to charge the requests, and did charge as excepted to.

VI. There was no contradictory evidence as to the alleged offer of February 12, 1857. By the defendants' own testimony, that offer amounted simply to this: That a chance meeting between the plaintiff's and defendants' attorneys on other business, after the conversion was perfect and the preparation of the complaint, the defendants' attorney said to the plaintiff's attorney, (no authority being shown in him to act on any offer that might be made,) that he might take the things that were loose; some

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of the things being spiked, secured, and some loose; none of the tools being designated, and the offer by its terms only capable of embracing an indefinite portion of the property in question.

Such offer could in no way affect the rights of the plaintiff, and the Court properly refused to charge that it was a bar to the plaintiff's action, and the charge in that respect is correct. The judgment should be affirmed, with costs.

BY THE COURT—PIERREPONT, J. The Sixpenny Savings Bank was incorporated by an act of the Legislature passed June 4th, 1853. (Laws of 1853, p. 670.) The Trustees named in the act and their successors were created a body corporate with perpetual succession, "by the name of The Sixpenny Savings Bank of the Empire City." The business of the corporation was confined to "receiving deposits from mariners, tradesmen, clerks, mechanics, laborers, minors, servants and others, and investing the same," in the mode prescribed. (§ 6 of act.)

By section 2 it is provided that "the said corporation shall not, directly or indirectly, deal or trade in buying or selling any goods, wares or commodities whatever, except in cases where it is authorized to do so by the terms of this act," &c.

Section 4 provides that "the business of the said corporation shall be managed and directed by the said Board of Trustees, who shall elect from their number a President, two Vice-Presidents, and such other officers as they may see fit; eight of said Trustees, of whom the President and one of the Vice-Presidents shall be one, shall form a quorum for the transaction of business, and the affirmative vote of at least seven members of the Board shall be requisite for the making of any order for investment," &c.

By section 7 the Board of Trustees are empowered to pass by-laws for the general management of the affairs of the corporation.

An examination of the charter and by-laws of the defendants shows that the corporation had no authority whatever to engage in any manner in the purchase and sale of goods, and the case does not disclose any practice or act inconsistent with the duties and restrictions imposed by law upon the defendants. They are charged with the conversion of certain machines and tools to

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their own use, and a judgment of \$4,801.80 has been obtained against them for such conversion.

It does not appear that the defendants have ever used or sold the property claimed to have been by them converted, or that they have ever derived any advantage whatever therefrom, or that the Trustees ever had knowledge of, or in any wise sanctioned the acts of which the plaintiff complains.

The acts complained of are those of Mr. Miles, the Vice-President of the Bank. The substance of all he did before the sale was to forbid the sale of fixtures belonging to the realty or of anything belonging to the defendants. "After the sale" Jonathan Purdy, a builder, who was present at the sale, says, "the plaintiff and Miles were talking about the delivery of the articles sold; Miles said he did not want anything but what were fixtures, and until it was ascertained what did belong to the Bank he did not want anything removed. Thomson asked how long it would take to ascertain that; Miles replied that as soon as he could see the attorney for the Bank, and ascertain what belonged to the Bank, he would make no further objection; Miles proposed that their attorneys should meet together. Thomson assented and agreed that the two attorneys should meet."

When the formal written demand was made upon Mr. Miles at his counting-house in Gold street, "he said he would lay it before the Board of Trustees of the Bank," and said "he could not at present give an answer."

The President declined to have anything to do with the matter, but referred the plaintiff to Mr. Miles.

After the formal demand and before the commencement of this suit the attorneys of the respective parties met, and the defendants' attorney asked the plaintiff's attorney why he did not take the articles, stating that the Bank had no objections to his taking them, to which the plaintiff's attorney replied that he should rely upon the demand made, and that Thomson wanted to get the value of the tools.

Soon after the commencement of this action the attorney of the Bank addressed a note to the plaintiff's attorney, referring to this affair, above mentioned, and asking him to take the articles and discontinue this suit, which proposition the plaintiff did not accept.

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At the close of the testimony on both sides, the counsel for the defendants requested the Court to charge the jury, 1. "That the general authority given to Mr. Miles to manage the business of the Bank in the absence of the President, did not empower him to commit the trover and conversion complained of."

2. "That proof must be given that Miles had specific authority to do the acts complained of, and that in the absence of such proof the presumption of law is that no such authority had been conferred on him."

3. "That the proof was insufficient to make out a conversion."

4. "That if Mr. Miles did not intend to assert a title to the goods in the Bank, but merely intended to postpone answering the demand until he should have received instructions from the Trustees or ascertained the rights of the parties, and he acted in good faith in the matter, the defendants are not liable."

5. "That the offer made by the defendants' attorney on the 12th of February, was a bar to a recovery here."

The Court refused so to charge as to each request, and the defendants' counsel excepted.

The Court charged the jury as follows:

"The defendants became owners of the building in which the articles in question were, on the 15th January, 1857; the articles were in the building at the time; the defendants were therefore lawfully in possession of the articles; the articles were sold under foreclosure of a chattel mortgage, on 30th January; the articles were at the time in the building; the plaintiff was the purchaser; he became entitled to have possession of the articles; to make the subsequent possession of the defendants tortious, it was necessary that a demand of possession should be made of the defendants, and that defendants should refuse to comply with the demand, or that defendants should undertake to exercise dominion over them in exclusion and in defiance of plaintiff's title: evidence of this fact, the property being in the actual possession of the defendants, would be evidence of a conversion of the articles, which would be conclusive until the contrary was proved, as by the pleadings the defendants disclaim all title in the goods themselves. The principal question turns on the fact of demand and refusal, or assertion of adverse control over the property; to constitute a proper demand, it must have been made

by a person entitled to make it, and of the party having the possession and control of the property, and to make out the case of a conversion, the refusal must be by the party having the possession or control, or legally bound to make the delivery, or by a person authorized by such party; if you shall be satisfied on the evidence that Miles was acting with the knowledge and sanction of the Trustees or by authority and sanction of the President, it is enough to make his acts in the premises binding on the defendants; you will then consider the evidence respecting the demand and refusal, and the conduct of the defendants, in respect to the property. Miles, at the sale, forbade the sale of property in which defendants had any right, but did not point out to auctioneer that property; he then told Leggett not to deliver any articles purchased at the sale, if parties who had purchased at the sale should call to take them away; his conduct, if Miles was acting with the knowledge and authority of the Trustees or President, would amount to a conversion of the property.

"But if you shall be of opinion under the evidence that the parties shortly after agreed that their rights should be referred to the lawyers of the respective parties, this, though the first meeting fell through, would be a waiver of this conduct of Miles as a tortious act, and the case would then turn on the question of demand and refusal. But if such was not the character of that arrangement it would have no such effect.

"The plaintiff contends that it was a mere agreement that plaintiff should suspend the assertion of his rights until Miles could consult his counsel. The plaintiff was not bound to wait an unreasonable time, and from 30th January to 12th February was an unreasonable time.

"Then as to the demand and refusal.

"The demand was in writing served on Miles; if Miles acted in the transaction with the sanction or assent of the Board of Trustees, he had authority to receive the demand and to refuse.

"Upon receiving the demand he was bound to deliver the property, or to refuse to deliver. After all that had taken place it was not sufficient for Miles to say he would lay the matter before the Board of Trustees.

"The defendants contend that the subsequent offer by defendants' attorney, before suit brought, is a bar to this action. This

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is not so. If that offer was tantamount to an absolute offer to deliver possession of the property, and plaintiff under it had gone and taken possession of the property, this, while it would not take away the right of action, might be considered on the question of damages, and go in diminution of them. But the plaintiff did not act on it, nor is the evidence under it very clear that he could have done so. Nor if he could was he bound to do so. In one sense only could this offer be material. If you shall be of opinion that both agreed that the demand by plaintiff should be held in suspense until Cromwell and Parsons had met and determined whether the Bank was entitled to any of the articles, and that the interview at which this offer was made was an interview between them for that purpose or that the offer was the result of their deliberations, then the offer, if full and complete, to surrender the possession of the whole, would be a bar; but the evidence will not justify such a construction. A meeting was appointed shortly after the sale. Plaintiff's attorney kept the appointment. Defendants' did not. Plaintiff had, some three days before the interview in question, served a written demand. The meeting at which the offer was made was on other matters, and the subject was introduced as the parties were leaving the room."

Thereupon the defendants' counsel duly excepted to each of the following propositions contained in the charge, namely:

1. That a demand and refusal are conclusive evidence of a conversion, until the contrary is proved.
2. That defendant being owner of the building, it was in possession of the articles in question.
3. That if the jury should be satisfied, on the evidence, that Miles was acting with the knowledge and sanction of the Trustees, or by authority and sanction of the President, it is enough to make his acts binding on the defendant.
4. That the conduct of Miles at the sale, if he was acting with the knowledge and authority of the Trustees or President, would amount to a conversion of the property.
5. That from the 30th January to 12th February was an unreasonable time.
6. That if Miles acted in the transaction with the sanction or assent of the Board of Trustees, he had authority to receive the

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demand and to refuse, and that it was not sufficient for him to say that he would lay the matter before the Board of Trustees.

7. To the proposition in respect to the offer of 12th February.

8. To the proposition that the evidence will not justify such a construction as to make the offer on the 12th of February a bar.

9. That Miles' answer to the demand was a refusal.

Where goods have been converted wrongfully for the benefit of a corporation, and they adopt the wrong by taking the avails of such conversion, the corporation is liable; and before the Code, an action of trover would lie, and now an action for the conversion of personal property in a like case may be maintained. (*Yarborough v. The Bank of England*, 16 East, 6; *Beach v. The Fulton Bank*, 7 Cow., 484.)

But in the case before us it is difficult to see how there has been any conversion of the plaintiff's property by the defendants.

The trespass complained of was not authorized by the Bank, nor did they afterwards sanction it or receive the avails of it, nor were the acts charged as having been done by Miles within the scope of his real or apparent authority as an officer of the corporation. If the Vice-President of a Bank commits a trespass quite outside of his official duties, and not within the real or apparent scope of his agency, without authority from, or subsequent ratification by, the Bank, he does not thereby render the corporation liable for his tortious acts. (*Vanderbilt v. The Richmond Turnpike Co.*, 2 Comst., 479; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 Kern., 633; *Weed v. Panama R. R. Co.*, 17 N. Y. R., 362; *Wright v. Wilcox*, 19 Wend., 845.)

The Judge charged the jury, "that if Miles was acting with the knowledge and sanction of the Trustees, or by authority and sanction of the President, it is enough to make his acts in the premises binding on the defendants; and that his conduct, if Miles was acting with the knowledge and authority of the Trustees or President, would amount to a conversion of the property."

To this part of the charge of the learned Judge we think the exception was well taken. The President could no more confer authority upon the Vice-President to do the acts complained of, than the Vice-President could confer the same authority upon the President; no such authority resided in either, and neither could

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by their wrongful acts bind the Bank under the circumstances of this case.

The Court further charged that, "upon receiving the demand he (Miles) was bound to deliver the property or to refuse to deliver. After all that had taken place, it was not sufficient for Miles to say he would lay the matter before the Board of Trustees." To this there was an exception.

If Miles had no authority from the Trustees to act in the matter, he could not bind the Bank by refusing to act until authorized by the Board of Trustees; and we are inclined to think that this part of the charge was erroneous, and that it might have misled the jury.

It is abundantly settled that a qualified refusal like this does not amount to a conversion of the property, and that the question of conversion is one of fact to be determined by the jury.

In the case of *Green v. Dunn*, (3 Camp., 215,) Lord ELLENBOROUGH held that a qualified refusal was not evidence of conversion.

And in *Watt v. Potter*, (2 Mason, 80,) Judge STORY, delivering the opinion of the Court, says:

"The first question is whether there has been a conversion in this case. This is a question of fact to be judged of by the jury under all the circumstances. A demand and refusal to deliver is not in itself a conversion; but it is evidence from which a jury may presume a conversion."

The case of *Alexander v. Southey*, (5 Barn. & Ald., 247,) was an action of trover for printing types and other goods, and was tried before Justice BEST; it appeared that the defendant, who was a servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods of the plaintiff, which had been carried to the warehouse of the Insurance Company by the servants of the Company.

The only evidence of conversion was, that when the plaintiff demanded the goods, the defendant said that he could not deliver them up without orders from the Albion office. The learned Judge left it to the jury to say whether this qualification of the defendants' refusal was a reasonable one, telling them that if so there was not sufficient evidence of a conversion. The jury

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found for the defendant. Denman moved for a new trial on the ground of misdirection.

ABBOTT, Ch. J., BAYLEY, HOLROYD, and BEST, J. J., all concurred and held that there was no misdirection, and that "if there be a qualification annexed to the refusal the question then is whether it be a reasonable one, and that such question is for the jury." (See also *Wilde v. Waters*, 32 Eng. L. & Eq. R., 428; *Mount v. Derick*, 5 Hill, 456; *Gunton v. Nurse*, 2 Brod. & Bing., 447; *Fouldes v. Willoughby*, 8 Meca. & Welsb., 540; *Hayward v. Seaward*, 1 Moore & Scott, 459.)

The Judge told the jury that the subsequent offer by the defendants' attorney before suit brought was not a bar to the action, and the defendants' counsel excepted to this part of the charge.

The case of *Hayward v. Seaward*, (1 Moore & Scott, 459,) was an action of trover to recover a steam boiler. The plaintiffs owned the boiler and demanded it in the month of October, 1830, and the defendants refused to deliver it. On the 12th of November following, the plaintiffs' attorney directed a letter to the defendants and stated that he was instructed to commence an action against them and asked the name of their attorney. On the following day the defendants' attorney addressed a letter to the plaintiffs' attorney stating that the plaintiffs might take the boiler away. On the same day a writ was issued against the defendants.

The cause was tried before TINDAL, Ch. J., who told the jury that the plaintiffs were not entitled to recover after the offer of defendants made by the letter of the 13th of November to give up the boiler.

The Justices on the hearing, all concurred, holding that the ruling was correct, that the demand and refusal was only evidence and not conclusive of the fact of conversion, and that the refusal was cured by the subsequent offer made by the attorney before the writ issued. A new trial should be granted.

WOODBUFF and MONCRIEF, J. J., concurred in reversing the judgment on the ground that the defendants upon the facts proven were not liable for the acts of Miles, their Vice-President.

Judgment reversed, and a new trial ordered, costs to abide the event.

JOHN H. HARRIS, Plaintiff and Respondent, v. THE PANAMA RAILROAD COMPANY, Defendants and Appellants.

1. In an action against a common carrier to recover the value of a horse, alleged to have been fatally injured through the negligence of the carrier during its transportation by him, although the evidence in respect to its value be conflicting and proper to be submitted to the jury, yet their verdict will be set aside as excessive in amount, if the verdict be for a sum which, in the opinion of the Court, is clearly much larger than is warranted by the evidence.
2. It is the duty of counsel, when objecting to a question, if he states the ground of objection, (as he may properly be required to do,) to state an objection which is well founded, otherwise his exception to the decision of the Court which overrules his objection and admits the evidence, will not avail him as an exception.
3. Hence, when, on the trial of an action, a question is put to a witness, and it is objected to on a specific ground, which is properly overruled, and the objecting party excepts, that exception will be unavailing, and will furnish no reason for relieving the party from paying costs as a condition of obtaining a new trial, although the Court are of opinion that upon other grounds not suggested on the trial, the evidence was inadmissible.
4. The Court may, nevertheless, if satisfied that injustice has been done, and that the jury may probably have been improperly influenced by the objectionable evidence, make that one of the considerations inducing them to grant a new trial on a case.

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, May 12th; decided, October 29th, 1859.

APPEAL by the defendants from a judgment against them for \$5,000 damages and costs, on the verdict of a jury, and from an order refusing a new trial.

The action was brought to recover the value of a horse, and was once tried in May, 1857, and, on appeal from the judgment for the plaintiff on the verdict for \$2,500, then rendered, the judgment was reversed and a new trial was ordered. (See report of the case and points decided, 3 Bosw. R., 7.)

The case came on again to be tried before BOSWORTH, Ch. J., and a jury, in November, 1858, when the plaintiff again had a verdict, and the jury assessed his damages at \$5,000.

The nature of the action, the evidence given, and the proceedings had at the trial, so far as they affect the merits of the pro-

sent appeal, or are material to the points decided by the General Term, are stated in the opinions.

D. B. Eaton, for defendants, (appellants.)

D. D. Field, for plaintiff, (respondent.)

BY THE COURT—PIERREPONT, J. Appeal from a judgment entered upon the verdict of a jury.

The action was brought to recover the value of a horse alleged to have been killed by the defendants' negligence while in transit on their railroad. The jury were properly instructed, that if the horse was killed by injuries received on the defendants' road, the Company were liable, and that the measure of damage would be the value of the horse at Panama. Under these instructions the jury found a verdict for the plaintiff of \$5,000. We are satisfied that the amount of the verdict was not warranted by the evidence.

This horse was purchased in the State of Indiana for \$700, and was soon after shipped for California, and died on the way. He was put on board the steamer *George Law*, bound for *Aspinwall*, on the 4th or 5th of April, 1855, and was soon after found to be out of condition. When he reached *Aspinwall*, in the course of that month, he was sickly, and so weak as to be scarcely able to walk without aid. From the evidence there is much reason to suspect that the horse died of disease not caused by the alleged injury.

It is quite clear that the evidence, under the law as charged by the Judge, did not warrant a verdict of \$5,000. The jury were instructed that if no such horse had been bought or sold in Panama, "in determining his fair actual value at that place they might take into consideration evidence of his actual value at San Francisco, if the evidence satisfied them that he had a certain market value there; but that they must take into consideration the risks and hazards of transportation and the expenses of transportation from Panama to San Francisco."

According to the testimony of *Weed*, *Nelson* and *Keyser*, witnesses for the defendants, the value of the horse at Panama could not have been over \$900. One of the plaintiff's witnesses

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says that if the horse had been sound and well, his value in San Francisco would have been \$5,000.

The other of the plaintiff's witnesses says, if sound and well he would have been worth in San Francisco \$3,000 and upwards. Austin, the only other witness examined on the part of the plaintiff as to value, was asked the following questions:

"Q. What was the highest price—being the fair market price—which you have ever known to be paid for a horse in San Francisco?"

Question objected to by counsel for defendants, because it is not an inquiry of the market value of a witness knowing it at the time. The objection was overruled; to which ruling the defendants' counsel then duly excepted.

"A. I think it was \$9,000."

It was a trotting horse. The injured horse was a running horse.

"Q. What was the market value of the injured horse in San Francisco?"

"A. I would not know the market value in San Francisco."

This question was pressed against the defendants' objection, for the obvious purpose of increasing the verdict.

The witness says that he did not know the value of this horse at San Francisco. The only legitimate inquiry was his value at Panama, or his value at San Francisco in order to ascertain his value at Panama at the date of the alleged accident; the witness having no knowledge of the value of such a horse as this at San Francisco, states to the jury the highest price that he has ever known to be paid for a horse in San Francisco, which he thinks was \$9,000.

This evidence would naturally tend to swell the verdict, and we think it clearly irrelevant to the issue. But the question before us is, whether there is any error of law raised by the exception.

If no objection is made to an improper question, admission of the answer is not error.

If objection is interposed on some specific ground alone, and the question is not objectionable on that ground, it is not error to overrule the objection.

For example, in the progress of a trial a copy of a paper is offered in evidence after due proof of loss of the original. It is objected to on the specific ground that it is a copy, and the objection is overruled, and the copy is read to the jury. When the case comes up for review on the exception it appears that the paper itself, whether original or copy, is wholly irrelevant; yet such exception could not be sustained. The attention of the Court being called to one specific objection which is not well taken it is not error to overrule it. So in the present case the question was objectionable. But the objection being placed upon one specific ground alone, which alleged ground had no sufficient foundation, it was not error to overrule it.

But in our opinion the verdict is larger than the evidence warrants in any legal view of the case, and for that reason a new trial must be granted, the defendants to pay the costs of the last trial; all other costs to abide the event.

WOODRUFF, J. I concur in the conclusion to which my brethren have arrived; that the damages found by the jury are excessive and not sustained by the evidence. The observations of Mr. Justice PIERREPONT do not, however, fully express my views of the evidence to which he has adverted and which he regards as irrelevant.

It seems to me that irrelevancy is not a just ground of objection to evidence which, when received, "would naturally tend to swell the verdict." If the natural tendency of the evidence would be to swell the verdict, it must be because it would naturally tend to induce the belief that the plaintiff's loss—i. e., the value of his horse—was greater than without such testimony the jury would have believed. It is true, that testimony may be irrelevant to the issue and yet operate to excite an undue prejudice against the defendant, and so incline a jury under the influence of passion to give exaggerated damages when the damages are, in a degree, in their discretion.

But here the inquiry was respecting the value of the injured horse, and to that end what was his market value in San Francisco. Now, if evidence that a horse was sold there for \$9,000, in connection with testimony previously given, tending to show that the horse in question was as good or better than any horse

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there, would naturally tend to induce the belief that the plaintiff's horse would have produced that sum, and so naturally tend to swell the verdict; it does not seem to me that the true ground of objection is that it is irrelevant.

By this I do not mean to be understood as regarding the question as admissible. The witness had been in California several times from 1849 down to and including 1855. He had testified to his knowledge of the horse market there. That he knew of sales of horses in San Francisco in 1855 and before that, and that he knew the value of horses in San Francisco. He had further testified to his acquaintance with the particular horse in question; his passage to Aspinwall on the same vessel, and his repeated examinations of the horse. The proper question to be put to the witness was, what in his judgment was the market value of the horse in question in San Francisco, if the value in that market was admissible, as was decided when this case was before the General Term on a former occasion. The inquiry into particular sales is not a competent line of inquiry to prove market value. Such an inquiry may be proper on a cross-examination, to test the accuracy of the witness' opinion and the grounds upon which it rests. On proof of the value of a horse, the testimony is necessarily and properly the opinion of competent men, familiar with the market, and the fair market value is what the horse will bring if offered for sale; and this is to be answered, not by proving the details which go to make up the experience of men of judgment and skill, but by requiring the witness to state his opinion as the result of the knowledge and experience he has had. What a particular horse sold for is not, therefore, a competent inquiry. It would lead to an endeavor to institute comparisons when comparisons would be dangerous, else it would involve the trial of the value of each horse and the inquiry into the particular circumstances of each sale to see whether the instance named was a fair example of the state of the market, or was a fanciful or exaggerated price obtained for peculiar reasons. And the rule is the same if the attempt were to depreciate; it is not competent to show that a sale was made for a merely nominal price, or that a useful horse was given away because a purchaser could not be found at the particular time when the owner desired to dispose of him. One man may give his horse away, or sell him

for a small sum, another may give a greatly exaggerated or fanciful price for a horse that is owned by one not desiring to sell, but who is tempted by the very eagerness of the buyer to part with him for a sum greatly exceeding his value measured by a just standard. So that the only just mode of arriving at the market value is by taking the judgment of those who, from knowledge of the state of the market and the current price of the like property, embracing also a knowledge of the particular horse in question, can form an opinion of his value. If, therefore, the objection taken to the testimony had called the attention of the Court to the objections now suggested, I cannot doubt the question would have been excluded; if not, the exception would, I think, have been well taken. The correctness of this view of the competency of the question is admirably illustrated by the answer of the witness to the subsequent questions. "The horse sold was a trotting horse; the injured horse was a running horse," and being asked the very question counsel had endeavored to prove him competent to answer, "what was the market value of the injured horse in San Francisco?" he says, "I would not know the market value in San Francisco." Thus illustrating that although the witness knew what many horses had sold for at that place, and especially knew of one sale for \$9,000, yet he could not judge of the value of the horse in question. If the witness could not, surely the jury ought not to be permitted to draw any inference touching the value of the horse in question from the fact of such a sale.

The objection, however, which the counsel did make to the question was groundless, and viewing the ruling of the court as merely passing upon the objection urged, and not as deciding generally upon the admissibility of the evidence, it was properly overruled.

The objection was that the inquiry was not of a witness knowing the market value at the time—i. e., at the time when the horse was injured and died. But the witness did know as much of the market value then as he ever did; he had testified that from 1849 to 1855, he was there several times; that he knew of sales in 1855 and before that; used horses all the time he was there, and he thought he knew the market value. He went out by the same ship that took the horse in question from New York, and went directly to San Francisco. Here was *prima facie* evi-

dence of his competency to give an opinion, and his experience and knowledge came down to the very time which was to be adopted in determining the value, viz., the season when the horse was injured. True, he afterwards showed he had not sufficient knowledge to enable him to state the market value of the horse in question, but at the time of the inquiry he had shown himself *prima facie* acquainted with the value at that time.

The objection made was therefore properly overruled; yet I am of opinion that the evidence was liable to the objections I have stated. If by the term irrelevant is meant that it ought not to be permitted to influence the determination of a jury nor enter into their deliberation because it does not, in judgment of law, furnish any safe guide to the determination of the question before them, then it may be called irrelevant.

Although the exception taken does not make the granting of a new trial a matter of right for the reasons above assigned, still the admission of the evidence and its objectionable character may properly be taken into view by the Court, on a motion for a new trial. The Court regard the damages as excessive, and on examination to see whether the estimate put by the jury upon the horse is the apparent result of an honest deliberation upon conflicting evidence, with nothing in the case producing an improper influence upon their minds, we find evidence received to prove that some other horse was sold for \$9,000, and can see that, it being received in spite of an objection, (though a groundless one,) the jury may well have regarded the ruling of the Court as an intimation that such evidence was proper to be taken into view in estimating the value of the horse in question. Where injustice is apparently done, the admission of improper evidence which might have influenced the jury, may be regarded by the Court on a motion for a new trial, although the objecting party has not, by the form of his objection and exception, placed himself in a situation to demand a new trial as matter of right.

I have never fully appreciated the justice of a rule which requires the party, in whose favor a new trial is ordered, to pay the costs if the error be deemed the error of the jury; but I suppose it to be too well settled to be at present disregarded.

New trial ordered, on payment of costs of former trial. The subsequent costs to abide the event.

**LIFE SMITH and JOHN BOYNTON, Plaintiffs and Appellants, v.
GEORGE V. HALL, Defendant and Respondent.**

1. An Insurance Company, incorporated by the laws of New York, cannot make a valid transfer of its notes, amounting to over \$1,000 in the aggregate, unless it is authorized by a previous resolution of the Board of Directors, if such transfer be made merely as security for a precedent debt, and to a person knowing that there is no such resolution authorizing the transfer.
2. When the transfer is made to a firm, one of whose members is a Trustee of the Company, the firm has constructive notice of the non-existence of such a resolution.
3. Where the complaint alleges an indorsement of the note by such Company to the plaintiff, and the answer denies the fact of such indorsement, and avers that the transfer was made by some officer or officers of the Company, when it was insolvent, to secure a precedent debt, proof is admissible that there was no resolution authorizing the transfer.
4. Where a promissory note, payable to the order of The Atlas Mutual Insurance Company, was transferred and delivered to the plaintiffs as security for a debt due to them by the Company, and the indorsement was in form: "Pay for account of The Atlas Mutual Insurance Company," G. H. T., Secretary, the restrictive form of the indorsement forms no obstacle to the plaintiffs' recovery on the note against the maker. The collection of the note, and the application of it to the payment of the debt of the Company, would be according to the right of the plaintiffs, and it would be a payment for account of the Company.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 10th; decided, November 5th, 1859.

THIS is an appeal by the plaintiffs from a judgment dismissing their complaint with costs. The action was tried before Mr. Justice SLOSSON, without a jury, in March, 1856.

The complaint states that the defendant made his note, dated the 10th of December, 1855, whereby he promised to pay, six months after its date, to the order of The Atlas Mutual Insurance Company, at the Atlantic Bank, \$150; that said Company "indorsed the same to said plaintiffs" before its maturity; that it is past due and wholly unpaid; and that the plaintiffs are the lawful owners and holders of it, and defendant justly owes them thereupon \$150, and interest from June 13th, 1856, and prays judgment accordingly.

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The answer avers that the note is wholly without consideration and void; denies that said Insurance Company indorsed it to the plaintiffs, or that they are the lawful owners and holders of it; and alleges that it was transferred to the plaintiffs by some officer or officers of said Company, when the Company was insolvent, to the knowledge of the plaintiffs, for a prior indebtedness of the Company, with intent to give a preference to the plaintiffs over other creditors of the Company, contrary to the statute, and that the plaintiff, Boynton, was at the time a Trustee of the Company.

It alleges that the Company owes the defendant \$300, "for moneys due on losses and reinsurance on policies of insurance heretofore issued by said Company to said defendant," which sum the defendant claims to set off.

It was proved on the trial that the note in suit, and another note of the same amount maturing June 8, 1856, were given by the defendant to this Insurance Company, upon an open policy, for premiums in advance. The defendant subsequently took risks, the premiums on which amounted to \$236.72. It did not appear whether the other note had or had not been paid. The note in suit, with other notes belonging to the Company, amounting in all to \$1,153.33, were delivered to the plaintiffs on the 15th of January, 1856, and the plaintiffs gave a receipt therefor, which described the notes and stated that they were "guaranteed by the Company." They were transferred to the plaintiffs as security for the payment of money which they had loaned to the Company previously thereto, (loans having been made from time to time from May, 1855, until shortly prior to the transfer of the note in question.)

It did not appear whether the balance due to the plaintiffs was more or less than the amount of the notes so transferred, or was just that amount, unless it appears from the testimony, uncontradicted, "that this note was indorsed to the plaintiffs for their own exclusive use, and in no part for the use of the Company."

George H. Tracy, the Secretary of the Company, indorsed and delivered the notes so transferred. The Secretary, to the knowledge of the Trustees, had been in the habit of indorsing the notes of the Company. This note, and those transferred with it, were indorsed and delivered to the plaintiffs with the knowledge

and approbation at the time of the President and Assistant President.

The form of the indorsement was: "Pay for account of The Atlas Mutual Insurance Company.

"GEO. H. TRACY, *Sec'y.*"

The words of the indorsement, except the name of the Secretary, were printed; and this form of indorsement was printed on many of the notes belonging to the Company.

This and the notes transferred with it, as testified, were "indorsed to the plaintiffs for their own exclusive use, and in no part for the use of the Company."

It did not appear that there was any resolution of the Board of Trustees authorizing the transfer of the 15th of January, 1856, and there was some evidence that no such resolution had been passed.

The plaintiff, Boynton, was a Trustee of the Company and had been from the time of its organization. The Company stopped payment on the 5th of March, 1856.

The Court found as facts:

"1. That the said note was made by the defendant, as alleged in the complaint.

"2. The it was indorsed by said Atlas Mutual Insurance Company as follows: 'Pay for account of The Atlas Mutual Insurance Company,' and delivered to the plaintiffs, with other notes, to secure to them the repayment of loans of money made by the plaintiffs to said Company at different times from May, 1855, to some time prior to January 15, 1856, and that the payment of said note was guaranteed by the Company.

"3. That the said note, with others, in all exceeding \$1,000 in value, were at one time indorsed as above and delivered to the plaintiffs, and that there was no resolution of the Board of Trustees of said Company authorizing said transaction, or in relation thereto.

"4. That said note was a premium note on an open policy, and given for premiums in advance, and that the Company was in the habit of using such notes, and selling and transferring them for the payment of its debts.

"5. That by the 12th section of its charter, said Company was authorized in the following words, viz.: 'The Company, for the

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better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business; and on such portions of said notes as may exceed the amount of premiums paid by the respective signers thereof, at the successive periods when the Company shall make up its annual statement, as hereinafter provided for, and on new notes taken in advance thereafter, a compensation to the signers thereof, at a rate to be determined by the Trustees, but not exceeding five per cent per annum, may be allowed and paid from time to time.'

"6. The plaintiff, John Boynton, was at the time of this transaction, and had been from the organization of The Atlas Insurance Company, one of its Trustees.

"7. The said note was not taken by the plaintiffs in payment of the indebtedness of The Atlas Insurance Company to said plaintiffs."

The Court held as conclusions of law :

"1. The indorsement of said note was restrictive in form, and did not transfer the title thereof to the plaintiffs absolutely.

"2. The transfer of said note was void under the 8th section of the act to prevent insolvency of moneyed corporations, as said transfer was not authorized by a previous resolution of the Board of Trustees.

"3. That said note was not such a note as is described in said 12th section.

"4. That the plaintiffs could not maintain this action."

The plaintiffs' counsel thereupon excepted to the said conclusions of law, and to each of them separately.

Judgment having been entered upon the decision, the plaintiffs appealed from it to the General Term.

J. L. Jernejan, for appellants.

Contended, *first*, That the form of the indorsement created no obstacle to the plaintiffs' recovery, and cited 2 Doug., 687; 5 Bing., 625; 3 Youngs & Jervis, 220; 1 Mood. & M., 158.

Second. That the answer did not set up as a defense that there was no previous resolution of the Board of Trustees authorizing the transfer, and therefore that fact could not be proved.

Third. That the note was one within the 12th section of the Company's charter, and therefore that a valid transfer could be made without a previous resolution of the Board, and cited 1 Sand. S. C. R., 629; 2 id., 180; 5 id., 591; 3 Comst., 290.

G. Dean, for respondent.

The indorsement was restrictive, and passed no title to the note. (8 Barn. & Cress., 622; 5 Mass., 543.)

This corporation is subject to the provisions of the Revised Statutes, to prevent the insolvency of moneyed corporations. (See its charter, § 22, and 5 Seld., 589.) The transfer in question is directly prohibited by 1 Revised Statutes, 591, § 8. (3 Kern., 116.)

The plaintiffs took with notice, and are not holders for value; and the transfer being prohibited by law, they cannot recover. (3 Kent's Com., 80; 16 N. Y. R., 129; 7 Barn. & Cress., 278; 6 Mann. & Grang., 766; 16 N. Y. R., 330.)

BY THE COURT—BOSWORTH, Ch. J. The note in question is proved to have been made upon consideration. Even if the note of \$150, maturing June 8, 1856, has been paid, there are \$86.72 due on this note. No set-off has been proved, or attempted to be.

The Company actually owed the plaintiffs the amount of the notes transferred on the 15th of January, 1856, for money loaned to it. There is not a particle of evidence that the note was transferred when the Company was insolvent, or contemplated insolvency, unless the mere fact that it stopped payment on the 5th of March, 1856, furnishes some evidence to that effect.

The terms of the indorsement do not alone present any obstacle to the plaintiffs' recovery. A collection of the note, or payment of it to the plaintiffs, to reimburse them the moneys they have loaned to the Company, would be a collection or payment for the purposes designed by the indorsement and transfer of it to the plaintiffs. (*Lloyd v. Sigourney*, 3 Youngs & Jervis, 220; *Nelson et al. v. Wellington*, July, 1859, Superior Court.)

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The Secretary is the officer of the Company who, frequently, if not usually, indorsed its notes on a negotiation of them by the Company.

The only important question is, whether the fact that there was no resolution authorizing the transfer can be set up as a defense to this action?

It is objected, *first*, that such a defense is not admissible under the pleadings. The answer not only denies that the Atlas Insurance Company indorsed the note to the plaintiffs, but avers that it was transferred to them by some officer or officers of the Company when it was insolvent, with intent to give to the plaintiffs a preference over other creditors of the Company contrary to the statute.

These allegations are to the effect, in substance, that the transfer was an unauthorized act of some officer or officers of the Company, and sufficiently import that it was not authorized in any manner by the Board of Trustees, and consequently not by any resolution passed by it. The allegation in the complaint, that the Company indorsed the note to the plaintiffs, being denied by the answer, it is essential to prove, in order to establish this allegation, that the making of the indorsement was authorized by law and the charter and by-laws of the Company. The word *indorsed*, as here used, imports a delivery of the note, as well as an authorized writing of the payee's name on the back of it. (*Griswold v. Laverty*, 3 Duer, 690.) It follows that if 1 Revised Statutes, 591, § 8, applies to such a transaction, then it is essential to the plaintiffs' title that it should appear, either directly or presumptively, that the transfer was authorized by a previous resolution. We think that there is no obstacle presented by the pleadings to the interposition of this defense.

Is the absence of a previous resolution of the Board of Trustees authorizing the transfer, a bar to this action?

Howland v. Meyer, (3 Comst., 290-293,) presented the case of a note within the 12th section of the act of incorporation, and the President of the Company was authorized by its by-laws "to transact all its ordinary business, and to perform whatever belongs to the executive department."

The note in suit is not one within the provisions of the 12th section, and the Secretary who transferred it is not shown to have

been authorized by the by-laws of the Atlas Mutual Insurance Company to transact its ordinary business.

There was not, therefore, in the present case, even such a previous resolution of the Board authorizing the transfer as would be implied by a preëxisting by-law authorizing the Secretary of the Company to transact its ordinary business.

The article of the Revised Statutes to prevent the insolvency of moneyed corporations, (1 R. S., 589,) is, by the statute itself, made applicable to corporations "authorized by law to make insurances." (Id., 598, § 54,) [sec. 51.] Even conceding that, where any charter granted subsequent to the passage of these statutes contains a section or sections in conflict with these provisions of the statutes, the general statute must yield to such sections in a subsequent act; yet, as the note in question is not one provided for by the 12th section of the Company's charter, that section does not exempt this transfer from the operation of section 8 of 1 Revised Statutes, 591. (Laws of 1843, 67-69, § 8, and Laws of 1842, 261, 263, § 12.)

Notwithstanding the opinion of GARDINER, J., in *Howland v. Meyer*, that notes given under the 12th section might be transferred by the Company to a creditor as security for his claim, he giving time until such notes matured, and notwithstanding he reëffirmed that proposition in his dissenting opinion in *Brouwer v. Harbeck*, (5 Seld., 596,) yet it is evident that the former case presented no such question; and the latter case holds, in effect, that the article of the Revised Statutes, before cited, applies to the assets of such an Insurance Company as the Atlas Mutual Insurance Company, excepting notes made under the 12th section of their charter.

The present plaintiffs are not purchasers for a valuable consideration without notice. The transfer was made to secure a precedent debt, and Mr. Boynton, one of the plaintiffs, was a Trustee of the Company when the transfer was made, and had been from the organization of the Company. He signed the receipt given on the transfer of the notes to the plaintiffs. They are not protected by the exception made by the last clause of section 8, 1 Revised Statutes, 591. (*Gillet, Receiver, v. Phillips*, 3 Kern., 114-117.) They knew the transfer was not authorized by a previous resolution, and that the note was not given under

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the 12th section, and they took it as security for a precedent debt.

We think the transfer was prohibited by law and was illegal, and that the plaintiffs acquired no title to the note, and that payment of it to them, with knowledge of all the facts, would not protect the defendant against a subsequent action by the receiver brought to recover the amount of the note. The judgment should be affirmed.

Judgment affirmed.

AMORY HOUGHTON, Plaintiff and Appellant, v. WILLIAM M. DODGE and CHARLES B. KNUDSON, Defendants and Respondents.

1. Where property of a moneyed corporation (*viz.*: a note made by third persons) is wrongfully taken by one of its officers, and all its claims against such officer, including its claim for the taking of such note, are subsequently settled, and a release given to such officer on taking his note for a balance agreed upon; although the persons acting in behalf of the Company in making the settlement and giving the release acted without competent authority to bind it, yet if the Company thereafter, with knowledge of such settlement and of its terms, indorses absolutely and appropriates to its own use the note received on such settlement, it thereby ratifies the settlement and vests in such officer title to the note so wrongfully taken, and he or his vendee can maintain an action on it against the makers.
2. When the proof is, that "the Company used the note" taken on such settlement, and "paid it to" a creditor "in payment of a debt which they owed to" such creditor, and there is no other evidence in respect to such transfer; the presumption is, that such transfer was made in a manner authorized by law and the charter and by-laws of the Company.
3. The owner of a promissory note can maintain an action on it, under the Code, in his own name against the makers, although not so indorsed that he can sue as indorsee by the rules of the common law.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 16th; decided, November 5th, 1859.

THIS is an appeal by the plaintiff from a judgment dismissing his complaint. The action was tried before Mr. Justice BOSWORTH and a jury in May, 1858.

The complaint states that on or about the 21st of August, 1855, the defendants made their note of that date for \$1,000,

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payable twelve months after its date to the International Insurance Company or order, at the Irving Bank, and delivered it to the Company; that the Company indorsed it in blank before maturity and transferred it for a valuable consideration; that the plaintiff afterwards became and now is the holder and owner of it; that it is past due and unpaid; and prays judgment for its amount with interest from the 23d of August, 1856.

The defendants admit, in their answer, the making of the note, and say on information and belief that there was not then, and has not been since then, such an incorporation; and they also say that the Company never indorsed the note in blank, nor transferred it for a valuable consideration. They put in issue the allegations of the plaintiff's ownership, and aver that he had no interest or property in it when it fell due, and that if he has any interest in it, he acquired it since its maturity.

They set up as a third defense that the note was taken from said Company "by the unauthorized act of one of the officers thereof, who converted the same to his own use, and that the property therein has never passed to the plaintiff or to any other person."

"*Fourth.* And these defendants for further and separate answer say, that they have a defense by way of set-off to the said note, as against the International Insurance Company, for money due to them, amounting to \$357 with interest, which amount they claim as a set-off against said note in this action."

The note in suit was produced at the trial, and (including the indorsements on it) reads thus, viz.:

"\$1,000.

NEW YORK, August 21st, 1855.

"Twelve months after date we promise to pay the International Insurance Company or order, for value received, one thousand dollars. Payable at Irving Bank.

(Signed)

"DODGE & Co."

(Indorsed.) "International Insurance Co.

"By WM. E. ROLLO, *Sec'y.*

"P. J. AVERY, *Pt.*"

The handwriting of Rollo, and that he was Secretary of the Company from its organization to January 17, 1856, and the

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handwriting of P. J. Avery, and that he had been President of the Company subsequent to the date of the note, having been proved, the note was read in evidence without objection.

The only evidence as to the origin and consideration of the note, and in relation to any set-off against it, is that of Charles W. Ogden who was Vice-President of the Company from the 20th of October, 1855, to the dissolution thereof in March, 1856, and that of Starbuck, who was elected President February 5, 1856.

Ogden says, "I think Dodge had a claim against the Company at the time this note fell due." * * "I think some six or seven or eight hundred dollars was taken up in premiums on this note before the claim of Dodge accrued." Starbuck says, "the note in suit was insured against. I do not recollect the amount earned on it."

In relation to the plaintiff's title, it was proved that the note in suit was in the possession of the Company during the Presidency of Marsh. He testified, "I am clear in my recollection of having seen that note in the possession of the Company after I became President. It was kept in a pocket book in the safe; I first found that it had been taken out some three or four weeks after I came in." He became President on the 15th of September, 1855.

It was also shown that in January, 1856, C. W. Ogden, who was elected Vice-President in October, 1855, got possession of the pocket book in which the Company kept its bills receivable, "and found a memorandum that this note and eight others, were in the possession of Avery, (P. J. Avery,) to be accounted for by him."

An account was produced with this caption: "1855, P. J. Avery in account with the International Insurance Company." Then follows a series of debits beginning with the date of May 7, 1855, and ending with October 31, 1855, amounting in all to \$42,903.49, and which include the note in question. Then follows a series of credits amounting to \$88,542.49, among which is the following, viz.: "C. Expenses, \$25,000."

At the foot of the account is the following, viz.:

"Received of Perez J. Avery, his note at thirty days, for the sum of four thousand three hundred and sixty-one dollars in full,

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for the above accounts, and in full satisfaction and discharge of all and every claim, of every name, nature and description, on the part or behalf of the International Insurance Company, against the said Perez J. Avery, and also in full satisfaction and discharge of all and every claim, of every name, nature and descriptions against William E. Rollo, late Secretary of the said Company.

"In witness whereof, the said International Insurance Company has caused this discharge to be signed by the officers of the said Company, at the office of said Company, this 21st day of April, A. D. 1856.

"The International Insurance Company,

"By M. STARBUCK, *President.*

"C. W. OGDEN, *V. P.*

"Attest, LEO. DEL BANCO, *Secretary.*"

A resolution on page 105 of the minutes of the proceedings of the Financial Committee of the Company was also read by the defendants' counsel, as follows:

"We, the undersigned, Financial Committee of the International Insurance Company, having had under investigation and examination the value of the charter of the International Insurance Company, procured and furnished the Company, by Perez J. Avery, as well as all charter expenses in procuring the same, and obtaining the amendment by the last Legislature, do report the same at twenty-five thousand dollars, (\$25,000,) and agree to give the said Avery credit for that sum.

"NEW YORK, October 29th, 1855.

"ALANSON MARSH, *Pres't.*

"JAMES A. REQUA,

"WM. E. ROLLO."

The gentlemen who signed this resolution continued as the Finance Committee, and acting as such after Starbuck became President; Mr. P. J. Avery was also one of the Finance Committee.

It was proved that, at the date of that paper, Starbuck was President, Ogden Vice-President, and Del Banco was Secretary

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of the Company, and that they severally signed the same, and that Del Banco signed it as Secretary, and not as a witness.

Of the by-laws of the Company, the following were read in evidence, viz.:

"1st. It shall be the duty of the President to attend daily to the affairs of the Company, at the office of the Company.

"2d. He shall be the financial officer of the Company, and, together with James A. Requa and William E. Rollo, shall constitute a Financial Committee. But all moneys for stock and for premiums shall be kept on deposit in some bank, either in the city of New York or Brooklyn; and no moneys shall be drawn out except on the checks signed by the President, and countersigned by the Secretary.

"5th. All papers required to invest and reinvest the funds of the Company, to collect, discharge, and cancel any papers appertaining thereto, shall be signed by the President, and countersigned by the Secretary, and shall be effectual in law to that end, and binding on the Company.

"10th. All accounts and liabilities of said Company, before the same can be paid, shall be audited by the Financial Committee, and whenever either of said committees are interested in any claim, the report, which in all cases shall be made and recorded by said committee, shall be signed by the two not interested."

In relation to the settlement between the Company and P. J. Avery, *Moses Starbuck*, who was then President of the Company, testified: "The settlement with him was an expedient; we made it as the cheapest way to get out of a scrape; he had got the notes, and we wanted this agreement made in order to get the balance due from him." * * "If he had not had the notes, I would not have made the settlement; I would have stricken out the \$25,000; it had been discussed, but not before the Board, but by the parties in interest; Mr. Dodge, one of the defendants, was a Trustee at the time; he was a Trustee when I was elected President," (which was the 5th of February, 1856.) * * "The Directors were frequently in the office, and this settlement was frequently the subject of conversation; no attempt was made to keep it private; the items of the settlement were entered in the account books of the Company, not in the book of minutes." * * "The Company had sixteen or eighteen Directors;" * *

"I think seven Directors constituted a quorum; no action was ever taken by the Board of Directors in opposition to that resolution," (the resolution of the 29th of October, 1855.) "No formal demand was ever made by the Company upon Avery for the notes; the Company used the note which Avery gave for the balance of the account; they paid it to the Globe Insurance Company in payment of a debt which they owed to the Globe Company." (It did not appear whether Avery did or did not pay this note at maturity.)

C. W. Ogden testified: "There was no resolution of the Board of Directors authorizing me to sign the agreement of April 21, 1856. It was never brought before the Board until after its execution; I had threatened to advertise the notes; Avery was threatening, and as there was an amount due from him over what he claimed, the President assented to it, and so did I, in consideration that he would resign as Trustee; it was a final settlement to get rid of him;" * * "when I signed that agreement, I did not consider I was perpetrating a fraud on the Company;" * * "I did not conceal it from the Board of Directors; it was not my duty to bring it before the Board; it was the President's duty; it was known to some of the members of the Board."

Del Banco testified that he signed the paper of April 21, 1856, as Secretary, and not as a witness.

Starbuck also testified: "Some of the Trustees knew of this transaction at the time, but as a Board I do not think they knew of it until May; the Board was divided upon the subject; some of them thought it best to let it alone, and did not want it disturbed; others were opposed to it; I don't know whether the Company owed defendants for a loss."

Ogden further testified: "The Board never knew of it until some time afterwards," (until some time after the settlement;) "they were opposed to it; the Board then adjourned, and before another meeting were enjoined; Mr. Dodge did not know of the transaction until the 24th of June, 1856;" * * "at the meeting of the 24th of June no resolution was arrived at about this agreement, or at any other time; before the next meeting, the Company was enjoined."

It was proved that the words indorsed on the note, "International Ins. Co., by," were in the handwriting of W. J. Avery, a

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brother of P. J. Avery, as is also the agreement of the 21st of April, 1856, and that "he acted for P. J. Avery in effecting that settlement" with Starbuck & Ogden.

Also, that the names of Rollo and P. J. Avery were not indorsed on the note when the latter took it from the pocket book of the Company, and that those names were not indorsed while Avery was President; and the evidence tended to show that the letters "Pt.," at the end of Avery's name, were not written by him.

It was also proved that the uniform mode of indorsing the notes of the Company is to add the name of the President to the words, "International Ins. Co., by," and that the Secretary never indorsed them.

It was proved by Charles N. Mills and Josiah Oakes that the former sold this note to the latter, in April, 1856, at a discount of one and a half per cent a month, and that the note was then indorsed in the precise form in which it appeared at the trial, and that it was sold by Oakes to the plaintiff shortly after its maturity.

When the testimony was concluded, the defendants' counsel "moved the Court to dismiss the plaintiff's complaint, on the ground that there was not sufficient evidence of the transfer of the note by the Company, and that the plaintiff had shown no sufficient title to the note.

"The Court granted the motion, and the plaintiff's counsel excepted."

A judgment having been entered in favor of the defendants, the plaintiff appealed from it to the General Term.

Wm. H. Leonard, for plaintiff, (appellant.)

I. The note in question must be considered as a business note, and that the defendants are liable, as makers, for the payment thereof. The whole case for the defendants rests on the alleged defect of the plaintiff's title.

II. The indorsement cannot now be disputed by these defendants, nor by the payee.

The settlement between the Insurance Company and Mr. Avery, of April 21st, 1856, is a ratification of the indorsement and transfer.

1. The Company have never repudiated that settlement by any action. They have adopted and sanctioned it by receiving and using the note of Avery for \$4,361.

2. The note in suit was charged to Avery on the books of the Company, and a memorandum was in their pocket book showing that all the notes mentioned in the settlement of April 21st, 1856, were in his possession.

As respects third parties, the Company must be deemed to have acquiesced in and adopted the transfer of the note in suit. (*Angell & Ames on Corp.*, 167, 168; *Conover v. The Mutual Ins. Co.*, 1 Comst. R., 290; *New Hope and Del. B. Co. v. The Phoenix Bank*, 3 id., 156; *The Bank of Genesee v. Patchin Bank*, 3 Kern. R., 309; *The Mechanics' Bank v. N. Y. and N. H. Railroad*, id., 622, 626; *Curtis et al. v. Leavitt*, 15 N. Y. R., 12.)

III. The indorsement and transfer being obligatory upon the Company, the defendants are necessarily precluded from any defense on the ground of an alleged defect in those respects.

IV. Mr. Oakes was a *bona fide* purchaser of this note for value, and the Company and the defendants are precluded from disputing the transfer, in which the Company are shown to have acquiesced.

V. The plaintiff has succeeded to and is entitled to enjoy and enforce all the rights which Mr. Oakes acquired in the notes in question. The Court erred in dismissing the complaint.

G. Dean, for defendants, (respondents.)

I. No matter what may be the decision of the Courts as to the necessity of a previous resolution of the Board of Directors, to the transfer of the assets of banks incorporated under the General Banking Law, this Insurance Company was, by its charter, made subject to the provisions of the 8th section of the statute to prevent the insolvency of moneyed corporations. (1 R. S., 4 ed., 1122, § 54; Laws of 1844, 233.)

II. The alleged transfer to the plaintiff was illegal and void, because contrary to statute, and also against public policy.

1. The transfer was contrary to statute. (1 R. S., 592, § 8; *Gillet v. Phillips*, 3 Kern., 116.)

(a.) Avery being a Director and officer of the Company, precludes him from saying that he had no notice of the want of a

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resolution of the Board. (3 Kern., 116; id., 599; *Hood v. N. Y. and N. H. Railroad Co.*, 22 Conn. R., 502, 508, 512; *Wyman v. Hallowell and Augusta Bank*, 14 Mass. R., 58, 62.)

(b.) The plaintiff is not within the exception to the 8th section, because he took the note with notice of the want of authority in Avery to transfer it.

2. The transfer was against public policy, which forbids an officer of a Company to transfer its assets to pay himself. "A Trustee can never appropriate the trust funds to his own use."

"This rule is of universal application, and to be enforced with unrelenting rigor." (Hill on Trustees, 159, 536; 12 Vea., 372; *Conger v. Ring*, 11 Barb., 356.)

(a.) A trust will be implied against one who purchases at his own sale.

(b.) Our statutes, which renders one liable to imprisonment for moneys received in a fiduciary capacity, is a legislative declaration of the settled conviction of all minds of the impolicy of permitting a Trustee to deal with the trust funds, except in strict accordance with the terms of the trust.

III. The plaintiff in this action took the note in suit, with notice of the defect of title, and cannot recover, unless Avery himself could have sustained the action.

1. To bring a party within the protection of the law merchant, he must not only be a holder for value, but also without notice. (3 Kent Com., 80.) Here there was no transfer in form by the Company, and the defect was patent.

2. "A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power." (16 N. Y. R., 129.)

3. He is also bound to know the manner in which the law requires these powers to be exercised.

4. When a party takes a note, indorsed by a person by virtue of a special power, he takes it upon the credit of the person who indorses it, and it is only reasonable prudence to require the production of that authority. (*Attwood v. Munnings*, 7 Barn. & Cres., 278; *Alexander v. McKenzie*, 6 Mann., Grang. & Scott, 766; *Dous v. Ferrin*, 16 N. Y. R., 330.)

5. This note did not purport to have been transferred or indorsed by the corporation.

IV. The transaction between Avery and some of the officers of the corporation was not only void but illegal. No right of action accrued either to him or to any person who received the note through him, while it was not indorsed by the corporation.

V. There was no ratification by the corporation of this remarkable transaction.

Ratification or not was a question of fact, which was passed upon by the Judge who tried the cause.

VI. A corporation, or its stockholders, or Receiver, may, in every case, impeach any contract made by Directors or other officers or agents, in the name and professedly by such corporation, by showing that such contract was made in a manner or for a purpose not authorized by its charter or the laws of the land. (*Hodges v. City of Buffalo*, 2 Denio, 110; *McCullough v. Moss*, 5 Denio, 567; 3 Barn. & Ald., 1; 1 Hill, 11; 4 id., 442; 3 Comst., 430; 1 id., 19.)

1. The defendants can set up this want of title; because,

(a.) They are members of the Company, and have an interest in its assets. (§ 6 of Charter.)

(b.) They are creditors for the return premium.

(c.) The transfer being contrary to law and public policy, is void, and there is defect of title in the plaintiff. (*Johnson v. Bush*, 3 Barb. Ch. R., 207; Code, § 111.)

VII. The fact that the note in suit is for less than \$1,000 is immaterial, because the evidence is uncontradicted that Avery, at the time he appropriated it, transferred effects of the corporation exceeding \$1,000 in value. (*Gillet v. Phillips*, 3 Kern., 116.)

BY THE COURT—BOSWORTH, Ch. J. On the evidence presented at the trial, the note in suit must be assumed to be a business note. The evidence tends to show that six, seven or eight hundred dollars of its amount had been received in premiums upon policies issued to the defendants by the Company. To this extent, at least, it was a valid note in the hands of the Company, without any defense against it. The sale by Mills to Oakes, even though made at a rate of discount exceeding seven per cent per annum, would not make the transaction usurious, as the note was a business note, made upon a valuable consideration.

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Treating the note as not so indorsed that the plaintiff can, by the rules of the common law, sue in his own name, the important question is, did P. J. Avery acquire such a title to it as would enable him to recover upon it upon the evidence before us, if he were the plaintiff in this action? If he acquired a valid title to the note, he or his vendee can sue in his own name (under the Code) as being the actual party in interest. The 10th of the by-laws authorized the Finance Committee to settle and audit all accounts and liabilities of the Company.

As early as the 29th of October, 1855, the Finance Committee audited and allowed the claim of P. J. Avery, for his services and expenses in procuring the charter and amendments to it, at \$25,000. A formal resolution to that effect, and of that date, signed by the Finance Committee, was entered on the book of the minutes of its proceedings, (at page 105.) That committee was competent to audit and settle this claim, and was the appropriate committee to make a legal decision in respect to it, which, at the least, would be, *prima facie*, valid as against the Company.

No action was ever taken or initiated by the Board of Trustees to disapprove of this settlement, much less to rescind or reopen it. None has been taken by the Receiver, if a Receiver has been appointed, nor does it appear by the evidence that he makes any claim to the note.

No testimony was given on the present trial with a view to question the propriety or justice, in whole or in part, of any other item of credit allowed to P. J. Avery in the settlement of the 21st of April, 1856.

If it be assumed, for the purposes of this trial, that the settlement of the 29th of October, 1855, was valid, then it follows, for aught that has been shown, that the final settlement of the 21st of April, 1856, was just as between Avery and the Company.

At and prior to that time, Avery was possessed of the note in suit, and the fact of such possession, and the manner in which he acquired the note, and his refusal to restore it to the Company, constituted part of their claim against him.

There was not any transfer made or attempted to be made in form by the Finance Committee of the note in suit, and the eight other notes of which Avery had previously possessed himself,

and which he insisted upon retaining. In the account with him, as settled on the 21st of April, 1856, they are charged to him under the date of October 31, 1855. It is not an unnatural inference that he had them as early as that date, if not prior thereto. Indeed, the testimony of Mr. Marsh tends to show that Avery had the note at as early a day as that on which it is charged to him.

An action could have been maintained against him for the conversion of these nine notes, or to recover the possession of them. The liability of P. J. Avery for these notes constituted a part of the claim of the Company against him.

On the 21st of April, 1856, all claims, either of Avery against the Company, or of the Company against him, were fully and finally settled. Many of the Trustees were parties to discussions in relation to it, and knew at the time of the terms of the settlement. The settlement was laid before the Board in May, but at how early a day does not appear. Whatever the date, the Trustees, as a Board, were then officially informed of the fact of the settlement and of its details. As a part of the terms of the settlement, P. J. Avery gave his note, payable thirty days thereafter, to the Company, as, and it was received by the officers acting in its behalf in that matter, "in full satisfaction and discharge of all and every claim of every name, nature and description, on the part or behalf of the International Insurance Company against the said Perez J. Avery." This note was for the sum of \$4,361.

Subsequently to this, "the Company used the note which Avery gave for the balance of the account. They paid it to the Globe Insurance Company in payment of a debt which they owed to the Globe Company." There was no attempt to prove that this note was not paid at maturity. It matured on the 24th of May, 1856.

Such a use of this note by the "International Insurance Company," with a knowledge of the circumstances and agreement under which Avery had given it, and the officers of the Company had accepted it, was a ratification by the Company of the settlement made with Avery on the 21st of April, 1856.

The note thereby became his property, if not previously his. The Company could not compel him to surrender it; certainly

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not without restoring him to the position he was in when the settlement was made.

Proof, uncontradicted and unexplained, that "the Company used the note which Avery gave for the balance of the account;" that "they paid it to the Globe Insurance Company, in payment of a debt which they owed to the Globe Company," imports that such transfer was made in a manner authorized by law and the charter and by-laws of the Company. The amount of the note so transferred is \$4,361. If a previous resolution of the Board of Directors was essential to a legal and valid transfer of it, the passage of such a resolution authorizing the transfer must be presumed upon such evidence as is above stated. If the Board of Directors passed such a resolution, then, inasmuch as it appears that some of the Directors knew for what the note was given at the time it was made, and considering the evidence tending to show that all of them probably knew the nature and particulars of the settlement made with Avery, the act of the Company in transferring the note is such a ratification of such settlement that these defendants cannot succeed on the mere ground that it was a nullity as between Avery and the Company. As the case is now presented, that is their only defense; and if that defense is not established, they have no defense.

It must be borne in mind that no evidence was given tending to show that any person has preferred any claim against the defendants as makers of the note in question, and that their whole and only defense is that the note in suit "was taken from the International Insurance Company by the unauthorized act of one of the officers thereof, who converted the same to his own use, and that the property therein has never passed to the plaintiff or to any other person."

The evidence given not only fails to establish the alleged fact on which the defense is rested, but, on the contrary, it proves an ownership of the note by Avery on the 21st of April, 1856, *prima facie* valid.

A suit, instituted by the Receiver of the International Insurance Company, on the 31st of October, 1856, (the time this suit was brought,) to recover the possession of this note from Avery, (if he had then held it,) on the ground that it belonged to the Company, could not be maintained on the evidence given

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in this action, if there were no other evidence in support of such action.

The case of *Houghton v. McAuliff et al.*, (decided in February, 1859,) is unlike the present in this respect. In that case there was no evidence that the Company had ever negotiated the note received from Avery, or had done any act by which they had treated or recognized it as the property of the Company, or as having been accepted with the sanction or by the authority of the Company.

The note, although not indorsed by the Company, could be sold to Avery and made his property; and although not indorsed so that an action would lie, at common law, in his name or in the name of a subsequent holder, yet any such holder, who was the actual owner, could sue upon it, in his own name, under the Code. (§ 111.)

It cannot be denied that it is competent for such a Company to sue any person who has wrongfully converted a note which belongs to it. Nor can it be denied that such a suit, followed by a judgment in favor of the Company and payment of the judgment, would vest in the person thus converting it, (after judgment and payment of the judgment,) exclusive property in the note as owner of it.

If he were to sue the maker subsequently, it cannot be possible that the maker could set up, as a defense, that it had been transferred to such plaintiff without the authority of a previous resolution of the Board of Trustees authorizing the transfer.

It was not intended by 1st Revised Statutes, (p. 591, § 8,) to incapacitate a moneyed corporation from settling claims for a conversion of or injury to its property, as natural persons may do; or through the action of such committees or officers as the Company might select for that purpose; or in any manner which, by the rules of the common law, would be obligatory and conclusive upon both parties.

The time of the transfer by the International Insurance Company to the Globe Company of Avery's note of the 21st of April, 1856, is not stated. The inference from the testimony given is, that the transfer was made before the maturity of the note, as the evidence is that it was transferred "in payment of a debt which they owed to the Globe Company." The testimony is that

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the International Insurance Company transferred it; and the only presumption admissible is, that the transfer was regular and in all respects according to law, and valid. The inference must also be, as the contrary was not alleged, that the note was paid at maturity.

It is difficult to conceive of any act of ratification more explicit and decisive, short of a formal resolution of the Board of Trustees, in terms approving of and confirming the settlement.

We think that the negotiation of this note by the Company, according to law and its charter and by-laws, with a knowledge of the circumstances under which, and of the particulars of the settlement as part of which, it was given and accepted, perfected Avery's ownership of it.

At all events, it establishes, *prima facie*, that the title to the note was in Avery on and after the settlement between him and the Company; and more evidence is necessary than was given to prove the fact that the Company was never divested of its title to such note.

The title of P. J. Avery to the note being, as between him and the Company, *prima facie*, absolute and perfect, the title of the present plaintiff is apparently complete.

There is, certainly, no such defect of title as will enable the defendants to succeed on that ground alone. As the case is now presented, the only defense that can be pretended is that the title to the note is still in the Company, or in the Receiver of its property and effects, if one has been appointed. That defense not having been proved, the dismissal of the complaint was erroneous.

We reverse the judgment, on the grounds that, upon the evidence given, it must be deemed to be proved that the Company negotiated the note received from Avery, with a notice of the terms upon which it was given and accepted, and thereby ratified the settlement made between its officers and Avery, and vested in him a title to the note in suit, *prima facie* valid; and that no evidence was given to impair the *prima facie* title thus established.

Judgment reversed and new trial granted, with costs to abide the event.

JOHN F. BUTTERWORTH, Receiver of the Island City Bank, Plaintiff and Respondent, v. ZACHARY PECK and NATHANIEL TERPENNY, Defendants and Appellants.

1. The drawing of a check on a Bank by one who keeps an account in it, and has, at the time, moneys to the same or a larger amount to his credit on its books, and a delivery of the check to the person named in it as payee, do not, of themselves, operate as an assignment to such payee of the title to any of the moneys thus standing to the credit of the drawer of the check.

(Before HOFFMAN, PIERREPONT, and MONCRIEF, J. J.)

Heard, November 1; decided, November 12, 1859.

THIS is an appeal by Zachary Peck and Nathaniel Terpenney, (the defendants,) from a judgment in favor of John F. Butterworth, Receiver of the Island City Bank, (the plaintiff,) entered on a verdict rendered on a trial had before Mr. Justice WOODRUFF and a jury, March 10, 1859.

The action is on a note for \$1,000, dated July 16, 1857, made by Peck, and payable to the order of Terpenney three months after its date.

The Bank discounted the note for Terpenney, and \$280 of its proceeds were standing to Terpenney's credit on the books of the Bank, when it became insolvent—he being a stockholder of the Bank, and keeping an account in it. It was admitted to have become insolvent on or before the 25th of September, 1857, and that Butterworth was then appointed a Receiver of its effects.

The note was made without consideration, and solely to accommodate Terpenney. Before the maturity of the note, the Bank declared a dividend of \$70 in favor of Terpenney, and this sum and the \$280 were standing to his credit on the books of the Bank when the note matured. On the 2d of September, 1857, Terpenney drew his two several checks on said Bank, and delivered them to Peck—one being for the \$280, and the other for the \$70; and at the same time indorsed and delivered to Peck a check of the same date, drawn on said Bank by one Thomas J. Mooney to Terpenney's order, for \$700. The last named check was drawn against funds on deposit to Mooney's credit in said Bank.

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Peck presented these three checks to the Bank on the 2d or 3d of September, 1857, for payment, and payment was refused. At the maturity of the note, he offered them at the Bank of the Republic, where the note in suit then was, in payment of said note; and made a like offer of them to the Receiver before this action was commenced, and both offers were declined. The defendants offered these three checks in evidence: the Judge admitted the checks for \$280 and \$70; and the plaintiff excepted. The Judge excluded the check for \$700; and the defendants excepted. The Judge charged the jury that the checks for \$280 and \$70 "were properly chargeable against the note," but that the check for \$700 was not, and that it could not be allowed as a set-off, or counterclaim: that they should render a verdict for the plaintiff for the amount of the note and interest, less the two checks for \$280 and \$70. The defendants excepted to so much of the charge as relates to the Mooney check: the plaintiff did not except to any part of it. The jury rendered a verdict for the plaintiff for \$712.44; and, from the judgment entered on that verdict, the present appeal is taken. No question arose upon the pleadings.

G. Clark, for appellants,

Insisted that the drawing of the check by Mooney in favor of Terpenney operated as an assignment to Terpenney of that amount of Mooney's funds held by the Bank, and cited 3 J. C., 264; *id.*, 5; 6 Cow., 484, 485; 3 Kent Com., 104, note *a*; 2 Story's R., 502, 516, 517; 1 Barb. R., 454; 1 E. D. Smith, 273; 1 Hill, 583-585; 1 Ves., 280, 332; 9 Cow., 414.

C. A. Peabody, for respondent,

Contended that a check drawn on a person having funds of, or being indebted to the drawer, does not, alone, transfer them to the payee of the check; and cited and commented on 5 Duer, 574; 26 Penn. R., 85; 11 Paige, 612; 3 Comst., 93; *id.*, 243; 3 J. C., 5.

BY THE COURT—HOFFMAN, J. The only question presented to the Court relates to the check of \$700, drawn by Mooney in favor of Terpenney upon the Bank, and transferred to Peck. Is this check, or the amount expressed in it, a proper set-off, or counterclaim, against the note sued upon?

The case of *Chapman v. White*, (2 Seld., 412,) seems to me to cover the present question entirely. It involves the position that the Island City Bank became the owner of the fund deposited by Mooney, and the latter had only a right of action against that Bank, and was in truth its creditor. The check was not an appropriation of a specific fund. It gave no right of action, as against the Bank, without acceptance; and if it gave no right of action, it cannot constitute a right of set-off, or counterclaim.

It may be that, when the Receiver shall wind up the affairs of the Bank, the holder of Mooney's check may claim a *pro rata* dividend of what the Bank owed Mooney, and the proportion of the assets coming to him. It is impossible, in the present action, to liquidate accounts so as to ascertain what this sum would be, and thus allow an offset to that sum.

The case of *Dykens v. The Leather Manufacturing Bank*, referred to by Justice GARDINER, was first before Assistant Vice-Chancellor HOFFMAN, in December, 1841. He held that the drawing of a check upon a bank was not a specific appropriation of the funds of the borrower to the payment of that particular debt, in preference to holders of checks subsequently drawn. The drawer, therefore, might countermand the order at any time before his draft was actually paid or accepted by the bank. This proposition was recognized by the Chancellor. (11 Paige, 617.) Without acceptance, or some act, such as certifying the check to be good, no liability is created between the Bank and the holder of the check.

The line of reasoning which the case of *Chapman v. White* appears to warrant, might seem to extend to the cases of the other checks given by Terpenny, which were allowed to be deducted by the learned Judge below. But the distinction is this: The Bank had, in discounting the note, expressly appropriated its avails to the demand of the party on whose account it was discounted. It was a fund specially set apart. Terpenny had not withdrawn the whole of this sum by the amount of the check for \$280. He gave Peck this particular sum by his check.

So as to the dividend of \$70, the Bank had declared the right of Terpenny to this specific amount, as a specific fund. Terpenny, therefore, had a right to say that the Bank held so much money on these two accounts particularly belonging to him, and

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applicable to the reduction of the note for which he was principally liable.

Had Terpenney drawn out these two funds and then redeposited them in one sum, the case would have been different. The judgment must be affirmed, with costs.

Judgment affirmed.¹

ERASTUS D. THAYER v. JAMES C. WILLET, Sheriff.

1. In an action against a Sheriff to recover the possession of personal property which the latter has seized under an attachment issued in an action on contract, pursuant to the Code, against the plaintiff's vendor; the Sheriff may allege in his answer and show by way of defense that the transfer to the plaintiff was made with intent to defraud the creditors of his said vendor, having first shown the existence of a debt by such vendor to the plaintiff in such attachment, and that the attachment was duly and regularly issued and executed.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, October 28; decided, November 12, 1859.

THIS action comes before the Court on a question of law arising at the trial, and there ordered to be first heard at General Term. It was tried before Mr. Justice SLOSSON and a jury on the 21st of May, 1859.

The action is brought to recover the possession of goods and chattels which the complaint describes, and alleges the defendant wrongfully took and wrongfully detains, and are of the value of \$2,000.

The answer of the defendant puts at issue these allegations, and then states as a separate defense that on the 26th of June,

¹ As to the main point discussed, see 6 Duer, 463, 483, 484, and 19 N. Y. R., 499. As to the charge in respect to the two checks of \$380 and \$70; it may be suggested that the plaintiff did not appeal; and therefore the appeal taken did not involve the question of its accuracy. But if the Receiver stood in no better situation in this respect than the insolvent Bank would if plaintiff (3 R. S., 464, [§ 42] 469, [§§ 68-74,] id., 41, [§ 7] 47, [§ 85] 6 Paige 220, 2 id., 581, 9 Cow., 409, 21 N. Y. R., 159,) it is difficult to see why Terpenney, whose moneys the Bank held and to whom the moneys were due at the time the Bank became insolvent to the extent of the \$380 and \$70, had not a clear right of set-off, and if he availed himself of that right as he did on the trial, it would necessarily avail to the same extent in favor of the other defendant, an accommodation maker of the note in suit.

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1857, one Mason A. Perkins owed Joseph and William Rosenthal \$818.62 on contract; that they on that day sued Perkins in the Supreme Court to obtain a judgment therefor; issued to defendant then being Sheriff, &c., a summons in that action to be served, and obtained duly from a Judge of the Supreme Court a warrant of attachment against the property of Mason and delivered it to the defendant to execute; that such warrant specified as the grounds for issuing it "that said Mason kept himself concealed within the State of New York with intent to defraud his creditors and to avoid the service of a summons;" that defendant as such Sheriff seized the goods in question under and by virtue of said attachment; and avers that when so seized they were "the property of the said Mason A. Perkins, or that he had a leviable interest therein, or that said goods and chattels were liable to be levied upon and taken under and by virtue of said attachment." That the plaintiff, on the goods being so attached and taken, claimed an immediate delivery thereof to himself and obtained it, as provided by chapter 2, of title 7, of part 2, of the Code, and it prayed a return and redelivery of the goods to the defendant, and damages for the detention thereof.

At the trial, the plaintiff read in evidence a bill of sale of the goods from Mason A. Perkins to himself, dated June 12, 1857; and gave evidence tending to show that the sale and transfer were made in payment of a preëxisting debt; that possession was taken on the execution of the bill of sale; that the defendant took them from plaintiff's possession on the 26th of June, 1857, and detained them until they were redelivered to the plaintiff by the Coroner, by virtue of proceedings had in this action under the Code, and that they were worth \$1,000, and rested.

The defendant then offered to prove the facts stated in his answer, in respect to Perkins' owing the Rosenthals, and the commencing of a suit by them against Perkins therefor, the issuing of the attachment and the regularity of the proceedings in respect thereto, that the defendant took the goods by virtue of said attachment, and further that said bill of sale was fraudulent and void as against Perkins' creditors, and especially the Rosenthals, as being made with intent to hinder, delay and defraud them of their lawful suits, damages, debts and demands, and that the plaintiff in this action had notice of such alleged intent.

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The plaintiff objected to this evidence on the ground that the Rosenthals were not judgment creditors of Perkins, but were only simple contract creditors, and as such could not attack the validity of the bill of sale; and that the defendant was not in a position, by reason of his holding said attachment and having taken the goods under it, to attack the bill of sale or question the plaintiff's title under it.

The Judge sustained the objection and excluded the evidence, and the defendant excepted.

The jury thereupon found a verdict for the plaintiff, and assessed the value of the property at \$1,000; damages for its detention being waived.

The Court then ordered the exception so taken to be first heard at the General Term, and the entry of judgment in the meantime to be suspended.

Wm. Curtis Noyes and A. J. Vanderpool, for defendant.

I. The decision in *Hall v. Stryker*, (2 Dist., G. T., opinion by Justice BROWN,) was cited and acted upon at the trial, and is a direct authority against the right to attach.¹

We submit that this case ought not to be followed, nor in any wise sanctioned. It is opposed to all prior decisions upon the point, and overlooks the principles and policy of the attachment statutes. It renders the remedy by attachment of comparatively little benefit to the creditor.

II. By section 227 of the Code, an attachment may be issued:

1. Against a foreign corporation.
2. Against a non-resident.
3. Against an absconding or concealed debtor.
4. Against a defendant, who is about to remove his property from the State.
5. When he has assigned, or disposed of, or secreted, or
6. When about to assign, or dispose of, or secrete his property with intent to defraud his creditors.

It issues against the two classes, one who have a facility (by reason of their non-residence), the other, who have shown the disposition to evade the payment of their debts, and against

¹ Since reported, 20 Barb., 105.

whom the ordinary legal remedies, with the delays incident thereto, would probably be unavailing. The ground of the writ has no effect upon its form, or the proceedings and duties and rights of the officer under it. Its object is to give the creditor a lien, or, as it is by the same section declared to be, "a security for the satisfaction of such judgment as the plaintiff may recover." The creditor cannot avail himself of this lien by having the property sold and applied in payment of his debt, until he has pursued his action to judgment and execution. His lien enables him to and protects him in retaining his debtor's property within the jurisdiction of the Court. (*Storm v. Waddell*, 2 Sand. Ch. R., 494; *Peck v. Jenness*, 7 How. U. S. R., 612.)

III. The effect of sections 231 and 232 is to give the officer the same authority to take the defendant's property, and hold it as a security *pendente lite*, as he has under an execution, to take and sell. It may be levied upon any property which the law will allow the creditor to reach by levy under execution, or proceedings supplemental thereto. (*McKay v. Harrower*, 27 Barb., 463, 469.)

The statute gives the creditor, by virtue of the levy under the attachment, a provisional lien upon the specific property of his debtor, to the extent of the judgment he may subsequently recover. It is authorized to be fastened upon the property *in invitum*, before the demand is established by judgment. When sold under execution, the title relates to the time of the levy under the attachment (*Coffin v. Ray*, 1 Metc., 212.) There is no difference between the lien acquired on a levy under an attachment and under an execution. (*Van Loan v. Kline*, 10 Johns., 129-131; *American Exchange Bank v. Morris Canal Banking Co.*, 6 Hill, 362-366; *Grosvenor v. Gold*, 9 Mass., 209, 210; *Drake on Attachment*, §§ 221, 226, 233; *Martin v. Dryden*, 1 Gilm., 188.)

IV. It is said, however, that "the attachment only directs a levy upon the property of the debtor." Is not the command of the attachment to the Sheriff the same in substance in an attachment as in an execution? But property transferred in fraud of the rights of creditors, although valid as to the debtor, remains, so far as the creditor defrauded is concerned, the property of the debtor, as to him the transfer is void, and as if the possession had remained unchanged. The command of the two kinds of

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process being the same, the authority to take is also the same, except where the statute has provided otherwise. (*Pratt v. Wheeler*, 6 Gray, 520; *Handy v. Dobbin*, 12 Johns. R., 220.)

This is a remedial statute, and is to be construed liberally. (Roberts on Fraud. Conv., 542.)

V. There are occasionally general expressions used by the judges, to the effect that in order to enable the creditor to attack the fraudulent conveyance, he must have first established his debt by a judgment and execution. But in none of these cases has the creditor claimed under an attachment, or any process by which the property of the debtor is made immediately or ultimately liable to be appropriated in satisfaction of the debt. They claimed, not as creditors who had pursued their legal remedies, and had the property placed in *custodia legis*, acquiring a lien, but merely as creditors at large, as in *Andrews v. Durant*, (18 N. Y. R., 496,) and *Reubens v. Joel*, (8 Kern., 488,) or were like the cases of *Frisbey v. Thayer*, (25 Wend., 396,) and *Hastings v. Belknap*, (1 Denio, 190,) in which a landlord proceeded, not as a creditor, but with a distress warrant under a special statute. His rights as a creditor are entirely distinct. (See Mr. Nash's points, submitted herewith.)

VI. The Courts of this State have uniformly held, that the officer could, under an attachment issued, pursuant to the statute relative to absconding and fraudulent debtors, attach and seize property in the hands of a fraudulent vendee, and maintain his lien upon it until judgment and execution. (*Noble v. Holmes*, 5 Hill, 194; *Van Etten v. Hurst*, 6 id., 311; *Halsey v. Christie*, 21 Wend., 9; *Cross v. Phelps*, 16 Barb., 502; *Miller v. Brinkerhoff*, 4 Denio, 118; *Van Kirk v. Wilds*, 11 Barb., 520; *Clute v. Fitch*, 25 id., 428; *Batchellor v. Schuyler*, 3 Hill, 386; *Falconer v. Freeman*, 4 Sand. Ch. R., 565; *Handy v. Dobbin*, 12 Johns. R., 220; *Wilson v. Forsyth*, 24 Barb., 119.)

- There is no difference between the rights of the officer, whether acting under an attachment issued pursuant to the Code, or under the statutes previously in force. The provisions of the different statutes are substantially alike in this respect.

VII. The decisions of the Courts of sister States, where the attachment is resorted to as one of the modes of legal proceeding to enforce the payment of debts, distinctly declare the right

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of the officer to seize the property in the possession of the fraudulent vendee. (*Damon v. Bryant*, 2 Pick., 411; *Pratt v. Wheeler*, 6 Gray, 520; *Owen v. Dixon*, 17 Conn., 492; *Angier v. Ash*, 6 Foster, 99; *Halsey v. Whitney*, 4 Mason, 206, 211; *Warner v. Norton*, 20 How. U. S. R., 448; *Tuppan v. Evans*, 11 N. H. R., 811.)

VIII. Upon principle, as well as upon authority, an attaching creditor can compel an officer to levy upon property in the possession of a party other than the debtor, where such party claims under a transfer from the debtor which is fraudulent and void as against his creditors. The statute relative to fraudulent conveyances does not say that the transfer shall be void only against judgment creditors; on the contrary, the transfers are void as to all creditors who signify their election to treat them as void, by adopting the process which the law provides, to enable him to avail himself of the property thus fraudulently transferred, so as to have it immediately or ultimately applied to the satisfaction of his debt. This is the class of persons referred to in the statute as creditors. Our law, beside the judgment and final execution, has provided the attachment process, whereby the creditor does not avoid the transfer immediately, but he can acquire the right, in certain cases provided by law, to have the property placed *in custodia legis* pending the action. (*Jackson v. Myers*, 18 John. R., 425; *Owen v. Dixon*, 17 Conn., 492; *Halsey v. Whitney*, 4 Mason, 206-211; 2 R. S., 136; *Clapp v. Leatherbee*, 18 Pick., 181.)

1. The statute which requires the Sheriff to retain the property seized under an attachment where a claim is interposed, and an indemnity given against the claim, is an affirmation of this view. The Sheriff can retain the property, notwithstanding the claim, even where no indemnity is given. (*Chamberlain v. Beller*, Ct. App., notes of decisions; *Bachelor v. Schuyler*, 3 Hill, 386; *People v. Schuyler*, 4 Comst., 173.)

2. We are further sustained by the fact, that one ground for granting the attachment is, that the debtor has fraudulently transferred his property.

3. If the right to attach does not exist where the debtor has made a fraudulent transfer, then the debtor has only to vest the legal title to his property in another by the most fraudulent con-

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trivance known, and betake himself beyond the jurisdiction of the Court, and the property will be fully protected.

4. Where the summons is not personally served on the debtor, the judgment recovered by publication only allows the property attached to be applied on the judgment. (*Thomas v. Merchants' Bank*, 9 Paige, 216, 218; *Corey v. Cornelius*, 1 Barb. Ch. R., 571; *Cochran v. Fitch*, 1 Sand. Ch. R., 142; *Martin v. Dryden*, 1 Gilm., 188.)

IX. It is true that a Court of Chancery will not ordinarily lend its aid to a creditor, to obtain satisfaction of his debts out of property not liable to be levied on by execution, unless he show an execution on his judgment returned unsatisfied. This has been the rule in England, where the remedy by attachment has not until very recently existed. The only attachment process which has existed there, has been that issued under the custom of London, the object of which was to procure the defendant's appearance, and when he did appear, and put in special bail, the attachment had served its purpose, and was of no further use. Here, however, we are acting under a power conferred upon a creditor by statute, who is pursuing his rights in a Court of law. We seek the benefit of a specific lien. But the Court of Chancery, on a bill filed to remove a fraudulent obstruction, always, where the attachment process has existed, recognized the lien acquired by an attaching creditor on the property fraudulently transferred, and the lien of the judgment, when recovered, related back to the time of levying the attachment. Wherever the law gives a lien, the party can go into chancery whenever necessary to obtain the benefit of it. (*Wilson v. Forsyth*, 24 Barb., 119; *Falconer v. Freeman*, 4 Sand. Ch. R., 565; *Scott v. McMillen*, 1 Littell, 302; *McElwain v. Willis*, 9 Wend., 548; *Tappan v. Evans*, 11 N. H. R., 311; *Kuttridge v. Warren*, 14 id., 509; *Hunt v. Field*, 1 Stock., 36; *Stone v. Anderson*, 6 Foster, 506; *Drake on Attachment*, 225, 2d ed.)

X. The necessity which is referred to by the Court, in the opinion in *Hall v. Stryker*, of producing the judgment, where the officer justifies a levy under execution, against the claim of a third person, is to show, first, that he is a creditor, and, second, that he has valid process. This necessity of establishing both of these grounds in the case of an attachment is conceded, and

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were offered to be proven on the trial in the only mode in which it can be done.

XI. The argument drawn from the inconvenience of having two issues upon the record, 1st, as to whether the party is a creditor; and, 2d, as to the fraud, is not entitled to any weight. It is not unusual to have a double issue, so to speak. Suppose goods which have been fraudulently purchased are afterwards found in the possession of a third person who claims as a *bona fide* purchaser. Two questions must be tried, 1st, original fraud, and yet the original vendee is not before the Court; and, 2d, as to *bona fides* and want of notice in the second purchaser. If hardships, they must be endured, in order to promote the administration of justice. (*Hunt v. Field*, 1 Stock., 36, 39.)

The exception should be sustained, and a new trial granted.

E. & E. F. Brown, for plaintiff.

I. No foundation was laid for proving the attachment and preliminary proceedings.

The plaintiff had shown a bill of sale to him of the property, prior to the attachment, payment of the consideration of the sale, and actual possession taken, leaving no doubt that the transaction was valid between the parties; that plaintiff's title was good as against Perkins.

II. The plaintiffs in the attachment suit have not recovered judgment against Perkins, and never may; and if the doctrine, as contended for by the defendant's counsel, be the law, the Sheriff (should the Rosenthals fail eventually to obtain judgment) might keep the property of the plaintiff, which he has attached, without accountability to any one.

In the first place, Perkins could not recover either of him or the Rosenthals, for the plain reason that long before the Sheriff attached the property, he had sold the same to Thayer, and received the full purchase price, and delivered possession thereof.

Again, the Rosenthals could not recover of the Sheriff after failing in their suit against Perkins; because, *first*, they would have no debt or judgment to be satisfied, or on which it could apply, and would not be accountable over either to Perkins or Thayer. And, lastly, if Thayer should sue the Sheriff for the property a second time, after failing to recover in this action, the

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Sheriff might successfully plead the determination of this action for the same property in bar of any recovery on a second suit. (*Embury v. Conner*, 3 Comst., 511.)

In such case the Sheriff would hold the property as a kind of godsend, illustrating very clearly the unsoundness of the doctrine contended for by the defendant's counsel and claimed to be law.

III. In point of fact, no evidence was excluded that could by any possibility have varied the plaintiff's case, or his right to recover, unless the defendant had also controverted some of the facts established by the plaintiff.

No evidence being given, or offered to be given, to disprove the case so made by the plaintiff, the evidence offered was wholly immaterial.

IV. But the main ground relied upon, is, that the defendant, without first showing a judgment, was not in a situation to attack the sale of Perkins to plaintiff, after he had shown a title good as against Perkins. (See the following authorities: *Jackson v. Cadwell*, 1 Cow. R., 622; *Parker v. Walrod*, 16 Wend., 514; *High v. Wilson*, 2 John. R., 46; *Frisbey v. Thayer*, 25 Wend. R., 396; Cow. Tr., vol. 2, p. 287, and cases there cited; *Crippin v. Hudson*, 3 Kern., 161; *McElwain v. Willis*, 9 Wend., 548; Cow. & Hill's Notes, 739, 1079-1082.)

The cases above cited all hold that the defendant, to justify, must have a judgment before he will be allowed to attack a sale, good as against the vendor, but claimed to be fraudulent as to creditors.

The rule in equity has been uniform, that before a conveyance, good as between the parties, can be assailed by creditors, the party assailing must be a judgment creditor. (*Crippin v. Hudson*, *supra*.)

There is not a case to be found under our attachment laws, where the question involved in this case has been distinctly presented and decided.

The case of *Van Etten v. Hurst*, (6 Hill, 311,) arose on demurrer to a plea of justification of the taking of property under an attachment from a Justices' Court. The plea was held to be bad on two grounds: *First*, because it did not allege that the defendant in the attachment was a non-resident of the county; and,

secondly, because it did not allege that the plaintiff in the attachment was a creditor of the defendant.

Justice BRONSON, who delivered the opinion of the Court, says, that "to attack the sale on the ground that, although it may be good as between the parties to it, it was fraudulent and void as against creditors, the party must show a judgment as well as an execution."

The decision of that point was all that was necessary to be decided in that action to show that the plaintiff was entitled to judgment on the demurrer.

It is true that Judge BRONSON adds, (*obiter*), that when the proceeding is by attachment, "they must show that the Justice had jurisdiction, and that the process was regularly issued;" but as the remark was unnecessary to the decision of the question, it is not an authority to show that a simple contract creditor, without a judgment, could attack the title of the vendee of property, having a title good as against the vendor, but claimed to be fraudulent as against creditors.

The rule at most is a rule of protection in behalf of officers in making their defense; but when they bring suit for the recovery of property attached, they are bound to show a valid judgment and valid process. (*Earl v. Camp*, 16 Wend., 562.)

The case of *Noble & Eastman v. Holmes*, (5 Hill, 194,) does not decide that a simple contract creditor, or one claiming to be such, can attack the sale of property by his debtor, good as against him, but is an authority for the plaintiff.

If a creditor wishes to impeach the sale of his debtor's real estate, on the ground of its being fraudulent as against creditors, he may sell the land on execution, and after obtaining a deed, bring ejectment for the land, and thus raise the question of fraud; or he may file a bill against the debtor and his fraudulent grantee, and try the question of fraud in that way; but in either case he must first obtain a judgment. Cases of the latter kind have been of frequent occurrence; but it is believed that no case can be found where a plaintiff in an attachment suit was ever allowed to sustain a bill to set aside a conveyance good as against the grantor or vendor, before he had obtained a judgment.

If the Sheriff can try the question of fraud against creditors in this suit, without first showing a judgment, such a bill might

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have been filed by the attaching creditors before judgment, and the fact that no other than an alternative decree could be made in such suit, proves the soundness of the rule established by the Courts, that judgment creditors only can attack a sale alleged to be fraudulent as against creditors.

The fact that such a contingency might arise, shows the necessity of the rule adopted by the Court in this case. (23 Wend., 480; *Brinkerhoff v. Brown*, 4 John. Ch. R., 671; *Clarkson v. Depeyster*, 3 Paige, 320; *Cuyler v. Moreland*, 6 id., 273; *Beck v. Burdet*, 1 id., 305.)

The last four cases cited above were creditors' bills filed after judgment.

It is held, however, in *McElwain v. Willis*, (9 Wend., 548,) that where the bill is filed to remove a fraudulent obstruction, it must show that the property is leviable at law on execution.

There must always be a judgment as the foundation of such a suit; but even a judgment and execution, returned unsatisfied, rendered in another State, or in the United States' Court, will not authorize the filing of a bill. (*Tarball v. Griggs*, 3 Paige, 207.)

Where proceeding is by attachment to obtain judgment, a creditor's bill will not lie even after judgment obtained. (*Thomas v. The Merchants' Bank*, 9 Paige, 216; *Corey v. Cornelius*, 1 Barb. Ch. R., 571.)

We submit to the Court that the exceptions of the defendant should be overruled, and a new trial denied.

PIERREPONT, J. This case presents the single question whether a Sheriff, acting under a warrant of attachment, regularly issued in an action, pursuant to the provisions of the Code, and who has attached property in the possession of a vendee, claiming title under a bill of sale from the debtor, can show in defense of a suit against him by such vendee, to recover the property, that the alleged sale was fraudulent as against creditors.

By section 227 of the Code, an attachment may be issued:

1. Against a foreign corporation.
2. Against a non-resident.
3. Against an absconding or concealed debtor.
4. Against a defendant who is about to remove his property from the State.

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5. When he has assigned, or disposed of, or secreted, or,

6. When about to assign, or dispose of, or secrete his property, with intent to defraud his creditors.

The warrant may issue when, by affidavit, it shall appear that a cause of action exists against the defendant, and the grounds and amount of the claim are specified, &c. (Code, § 229.)

Before issuing the warrant, an undertaking with sufficient surety is required. (§ 230.) And the warrant shall be directed to the Sheriff, and shall require him to attach and safely keep such property of the defendant as may be sufficient to satisfy the plaintiff's demand, including costs and expenses. (§ 231.) And the Sheriff is required "*to keep the property seized by him to answer any judgment which may be obtained in such action.*" (§ 232.)

If the writ under which the Sheriff took this property had been an execution instead of a warrant of attachment, he could have given evidence that the sale to the vendee, Thayer, was fraudulent and void as against the creditors of Perkins. This proposition is too familiar to require any reference to authorities.

An execution is directed against the property of the defendant. The same is true of the warrant of attachment. But it is urged that an execution is founded upon a judgment, by which the relation of debtor and creditor is established, while the warrant of attachment rests upon an alleged claim, supported only by *ex parte* affidavits sufficient to obtain the warrant, and to make a *prima facie* case which a trial may disprove.

Now, what did the Legislature intend by these provisions of the Code?

When this statute was passed, the law relating to sales and transfers of property, with intent to defraud creditors, had long been in force, and all such sales were void. The Sheriff who had seized property under a *fi. fa.*, might, in an action against him by the vendee of the defendant, show that the title of such vendee was fraudulent as against creditors.

This being the well settled and long established law, the Legislature enacts, that when a defendant "has assigned or disposed of his property with intent to defraud his creditors," an attachment (on proper application) may issue, and the defendant's property be held by the Sheriff to answer any judgment which may

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be obtained in the action. Did the Legislature intend to say that a fraudulent assignment of a man's property should be a ground for an attachment, and yet that the fraudulent assignee could forthwith take such property from the Sheriff or sue him in trespass, and the Sheriff have no right to set up the fraud in defense of his lien and his right to hold the goods?

A owns a store of goods of great value; just before 3 o'clock he goes to B and borrows \$20,000, and gives his check payable the next day. On the following morning A transfers his entire stock of goods to his son by bill of sale, duly executed, for the consideration of one dollar and love and affection. The son takes possession, and the father retires, and refuses to pay his check. B obtains a warrant of attachment on the ground that A has disposed of his property with intent to defraud his creditors. The Sheriff seizes the goods in possession of the son, who thereupon sues the Sheriff for the value of the goods; proves the bill of sale and possession. The Sheriff offers to show the sale fraudulent, but is met with the objection that the transfer as between the father and son is good, and that B is not a "*judgment creditor*," and hence no evidence of fraud in the sale can be admitted. In my judgment, the intention of this statute is clear. Its plain meaning is that a creditor, whether by judgment or otherwise, upon giving the requisite bond and making the requisite affidavit, shall have the right to cause the Sheriff to attach the property of the defendant, and keep it to answer any judgment which may be recovered in the action. A transfer of property with intent to defraud creditors, is void; not void as to judgment creditors alone, but as to all creditors; the statute makes no distinction. A transfer which is void conveys no title. The moment the attachment issues, the plaintiff in the attachment is, *prima facie*, a creditor, and has, so far as the attachment is concerned, all the rights of a judgment creditor, until his *prima facie* claim is defeated.

If the plaintiff in the attachment does not prove his claim, he fails in the action, and the Sheriff holds the property ready to be returned to the vendee from whom it was taken, or he responds in such damages as the law awards. But if the plaintiff in the attachment succeeds, and the title of the vendee is adjudged fraudulent, then the property is applied to the payment of the

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judgment which the attaching creditor has recovered, and no injustice is done, and the intention of the law is satisfied.

Under the statute relating to absconding and fraudulent debtors, attachments have repeatedly been issued, and our Courts seem to have recognized the right of the Sheriff to maintain his lien upon property attached in the hands of a fraudulent vendee until a determination of the action.

In the case of *Falconer v. Freeman*, (4 Sand. Ch. R., 567,) the Court say: "The complainants, although *creditors at large*, have acquired a *lien* upon Freeman's property by this attachment; it is as valid and effective a lien in favor of all creditors as is made in favor of a plaintiff at law by the issuing of an *execution*, which he is prevented by some fraud of his debtor from levying on movable property."

In *Noble v. Holmes*, (5 Hill, 194,) Judge BRONSON says: "The sale could not be impeached by a creditor at large. It must be a creditor having a judgment and execution or some other process which authorizes a seizure of the goods.

"As a general rule, process regular upon its face is sufficient for the protection of the officer, although it may have been issued without authority. But when the officer attempts to overthrow a sale by the debtor on the ground of fraud, he must go back of his process and show authority for issuing it. If he act under an execution he must show a judgment, and if he seizes under an attachment he must show the attachment regularly issued."

The same principle was recognized in *Van Etten v. Hurst*, (6 Hill, 311,) and also very directly by Judge HARRIS in *Van Kirk v. Wilds*. (11 Barb., 520.)

The case of *Warner v. Norton et al.*, came up by writ of error from the Circuit Court of the United States for the Northern District of Illinois, and the Court held, that

"Where a Sheriff was sued for taking goods under an attachment, which goods had been previously assigned under circumstances which were alleged to be fraudulent, it was proper for the Court to charge the jury, that if they believed from the evidence that the sale was made for the purpose of hindering, delaying or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of

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fact to be determined by the jury under all the circumstances of the case. (20 How. U. S. R., 448.)

An execution directs the Sheriff to take the property of the defendant. The warrant of attachment does the same. The command in each writ, in this respect, is identical, and the authority to take is the same. Under the present statute, the warrant has even a greater power than an execution. It reaches all things which an execution might take, and debts, equities, things intangible besides.

In *Handy v. Dobbin*, (12 Johns. R., 220,) SPENCER, Ch. J., says: "There can be no doubt that the constable under the attachment could take any goods and chattels which could be levied on by execution. The authority in both cases is the same."

Mr. Justice WELLES, in *McKay v. Harrower*, (27 Barb., 463, 469,) says: "An attachment issued under the Code, is more in the nature of the former writ of *fiery facias*, as to its object and effect, than of any other common law writ." "It is in effect an initiatory execution against the defendant's property before judgment, and issued in anticipation thereof."

The case of *Pratt v. Wheeler*, (6 Gray Mass., 520,) was recently decided by the Supreme Court of Massachusetts. In that case it appeared that a tenant in possession of real estate claimed title under a levy upon the premises as the property of Taft & Gleason, made the 6th of July, 1855; that the action against Taft & Gleason was commenced by "general attachment," dated April 8d, 1855.

Prior to the attachment, and so early as October, 1854, Taft & Gleason had conveyed this property to one Bancroft, by deed, which was duly recorded. Bancroft conveyed the premises to Edward Lamb, by deed, dated March 24th, 1855, which was also duly recorded prior to the attachment.

Upon the trial, the tenant offered to prove that the deed from Taft & Gleason to Bancroft, was made without consideration and to protect the property of Taft & Gleason from attachment, and contended that it was therefore void as against their creditors. The Judge, before whom the action was tried, admitted the evidence, and submitted the question of fraud to the jury, who found in favor of the tenant. Exception was taken, and on the

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hearing above, Chief Justice SHAW, delivering the opinion of the Court, says:

"The Court are of opinion that the attachment on *mesne process*, though in general terms, was sufficient to bind the estate if afterwards levied on." * * * "It is stated in the argument that this rule ought not to apply, when the estate attached does not stand in the name of the debtor. No authority is cited for this distinction. Perhaps it is founded on the supposed misdescription in the return, as 'of all the interest of Taft & Gleason,' the defendants, while they had conveyed it away and had no interest. But it seems to us that this distinction cannot be sustained. The theory of the law is, that such a deed, by a debtor to defraud creditors, passes nothing; for all purposes of *attachment*, the estate is the property of the debtor; it is attached as his, levied upon as his; the title, by force of the levy, passes directly from the debtor to the execution creditors. The intermediate deed is void; and therefore the estate is not misdescribed as the estate of the debtor, though such deed be on record." The fact that in this case a judgment was obtained after the attachment, can make no difference in the principles upon which the Court based their decision.

In *Lyon v. Sundford*, (5 Conn. R., 548,) the Court held that "the lien by attachment was as sacred as a lien by mortgage."

In *Owen v. Dixon*, (17 Conn. R., 498,) the Court held that a creditor at large, without process, could not impeach a fraudulent conveyance; but that a creditor, having some process on which the property might be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of the debt, could impeach such fraudulent conveyance: and that whether the process was attachment or execution made no difference. The case of *Peck v. Whiting*, (21 Conn. R., 206,) seems also directly in point. The statutes of Massachusetts and Connecticut, relating to attachments and fraudulent conveyances, are so like our own that their decisions bear directly upon the question before us.

In the late Court of Chancery, a bill to set aside a fraudulent conveyance would not lie in favor of one who claimed to be a creditor before judgment and execution; and such creditor could obtain no lien by filing his bill or *lis pendens*. And the

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same is now true of proceedings which are in the nature of the old creditor's bill in equity ; and hence it is asked why a creditor, before judgment, can obtain that indirectly by attachment which he could not obtain directly by bill in equity or its substitute? The answer is, that the statute gives him the right in the one case, and not in the other. Under the statute, the attaching creditor pursues his legal remedies, and acquires such rights or liens as that statute gives him. If his case does not come within the statute, he cannot avail himself of its provisions. There are many cases where a bill may properly be filed to set aside fraudulent conveyances in which no attachment could issue. But in a proper case for an attachment, where the creditor seeks his remedy under the law, and in conformity therewith obtains a warrant, and the Sheriff, under such process, seizes goods as of the defendant, he acquires a lien upon those goods, if they are in fact the defendant's. They are his if the sale was void. It was void, if made with intent to defraud creditors, and the Sheriff's apparent lien and special property, with right of possession, will remain until that question of fraud can be tried, or until the plaintiff is defeated in his action. We think one of the very objects of the statute was to reach in a summary way the debtor's property fraudulently transferred, and to hold it safe in the custody of the law until the creditor might have an opportunity to prove his demand out of which the debtor was, by the sale, endeavoring to defraud him.

I have found no case reported in which it has ever been held that the sheriff's special property or lien, acquired by seizure under a regular attachment, has ever been defeated by a vendee of the defendant in the action where the sale to such vendee was fraudulent as against creditors, and no case in which evidence of such fraud was excluded when offered by the sheriff in his defense.

The case of *Andrews v. Durant*, (18 N. Y. R., 500,) and the other cases where like remarks have been made in the course of the decisions, are not in conflict with this view. In none of those cases did the question of the Sheriff's lien or special property, by virtue of an attachment, arise; and the Court did not pass upon or in any manner seem to have had their attention called to such a case.

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I am aware that in the Second District, a General Term of the Supreme Court, held by three eminent Judges in this State, have held a contrary opinion in a case like this. (*Hall v. Stryker, Sheriff.*) Entertaining as we do, for the judgment of a Court so constituted, the highest respect, we are, nevertheless, compelled to differ in our construction of the statute.

A new trial should be granted, costs to abide the event.

HOFFMAN, J. The case has been treated by the learned counsel on both sides as one of great importance, not only in relation to numerous actions, involving large amounts, dependent upon its determination, but as to the principles which it embraces, and the consequences which it entails. A decision of the learned Court of the second district, expressly to the point, has also been brought before us; and, as our conclusion is adverse to that decision, it is proper to state our course of reasoning with fullness and with care.

The defendant—the Sheriff of the county of New York—has seized certain goods upon an attachment, under the Code, issued to him in an action in this Court still pending. The plaintiff in the present action claims such goods under an assignment made prior to the attachment. The question is, can the Sheriff, the defendant in the present action, set up fraud in the assignment as a defense?

The objection is urged, with great apparent strength, that none but a judgment and execution creditor is allowed to impeach an assignment or transfer of property as fraudulent; that the demand of a creditor must be first judicially determined; that the whole inquiry, trial, and expense of testing the question of fraud may turn out utterly useless, as the plaintiff in the action may be defeated; and that thus principle, authority and expediency are repugnant to the allowance of the proposed defense.

These objections, with some others, are urged in the opinion of Mr. Justice BROWN, in the case of *Hall v. Stryker*, (29 Barb., 105,) in which the General Term of the second district expressly decided the question before us, adversely to the claim of the defendant here.

The learned Judge presented the question thus: "I shall examine whether a person, claiming to be a creditor, with a warrant of attachment under the Code, but with no judgment or

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execution for his debt, has a standing in Court which will enable him to impeach and litigate the *bona fides* of a sale of goods by his alleged debtor to a third person, which has been consummated by transfer and delivery of the possession before the lien of the warrant attached?" The case is then examined, and various propositions stated and argued, upon which the conclusion was arrived at denying the right of such a creditor. These are adverted to in the following opinion.

The Code has expressly authorized an attachment to issue when a person has assigned, disposed of, or secreted any of his property, with an intent to defraud creditors. The property is to be attached as security for a judgment which may be recovered by the plaintiff. (§ 227.) The affidavit under section 229 makes a case for the attachment when it appears that a cause of action exists, and that the party has assigned, disposed of, or secreted his property with intent to defraud his creditors. The warrant directs the Sheriff to attach and safely keep the property of the defendant within his county. (§ 231.) By section 232, he is to collect and receive into his possession all debts, credits and effects of the defendant, and may take such legal proceedings as may be necessary for that purpose, either in his own name or in that of the plaintiff.

In thus explicitly sanctioning an attachment when property has been fraudulently assigned, the Code appears to warrant, necessarily, an inquiry into the fraud, and a contest with the alleged fraudulent assignee; and it seems to warrant this upon the attachment merely.

Again, the case of an attachment differs from that of a simple contract creditor bringing an action to impeach an assignment, (*Neustadt v. Joel*, 2 Duer, 530; 3 Kern., 488,) in two important particulars. First, by the 229th section of the Code, a Judge is to issue the warrant "when it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, and showing a case for an attachment." Here is something of a judicial declaration that the plaintiff appears entitled to recover money, (§ 228;) in other words, that he is a creditor. Next, it cannot be questioned that the attachment constitutes a lien upon property levied upon in any mode, by actual seizure or otherwise, which is allowed by law.

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The language of the 227th section is clear and comprehensive. The property which may be attached, (not actually seized,) is to be attached as security for the judgment which may be recovered.

In *Peck v. Jenness*, (7 How. U. S. R., 612,) the disputed question, whether an attachment was a lien within the 2d section of the Bankrupt Act, was determined. The Court say: "An attachment on *mesne process* creates a charge on the property attached in favor of the plaintiff which is, in the language of the Courts and the statutes of New Hampshire, called a security and a lien." Cases are cited to show its similar designation in Massachusetts and Connecticut. (See, also, the elaborate opinion of Vice-Chancellor SANDFORD in *Storm v. Waddell*, 2 Sandf. Ch. R., 494.)

And in *McKay v. Harrower*, (27 Barb., 463,) the writ is thus spoken of: "An attachment, under the Code, is more in the nature of the former writ of *fieri facias*, as to its object and effect, than of any other common law writ. It is, in effect, an initiatory execution against the defendant's property before judgment, and is issued in anticipation thereof."

It has been very justly observed that the statute as to fraudulent conveyances (2 R. S., 137, § 1,) does not prescribe that a creditor must have a judgment to entitle him to impeach an assignment. Its language is that every conveyance, assignment, &c., made with intent to delay and defraud creditors of their lawful suits, damages, debts or demands, shall be void, as against the persons so hindered, delayed or defrauded.

And the statute of 18 Elizabeth, cap. 5, was similar in its language.

It has become a settled rule of law that a general creditor cannot avail himself of the statute until he has obtained a judgment and execution, (2 John. Ch. R., 144,) and the Revised Statutes (2 R. S., p. 173, § 41,) embodied this rule inferentially at any rate in express enactments.

Yet it seems clear that there is no statutory provision which prevents a creditor before judgment, who has obtained a statutory lien, from pursuing this course of redress.

I proceed to notice some important authority upon this point:

In *Giddings v. Coleman*, (12 N. H. R., 153,) such a course was sanctioned. "It was a controversy in effect between a creditor seeking to recover a past debt by process of law and one claim-

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ing to be a creditor and *bona fide* assignee of the debt which was the subject of dispute. The latter must show that his assignment was *bona fide* and upon sufficient consideration." *Angier v. Ash*, (6 Foster, 99,) is to the same effect. In *Hare v. Anderson*, (6 Foster, 506,) the point was decided, after a full consideration, that an attachment was such a lien upon property as enabled the creditor to file a bill to set aside a fraudulent obstruction. *Kittredge v. Warren* is cited as to the same effect. (14 N. H. R., 509.)

The case of *Pratt v. Wheeler*, (6 Gray R., 520,) is open to the criticism that a judgment had been obtained, but the language of the Chief Justice is very pertinent. "The theory of the law is, that such a deed by a debtor to defraud creditors passes nothing; for all purposes of attachment, the estate is the property of the debtor; it is attached as his; levied upon as his; the title passes directly from the debtor to the execution creditor. The intermediate deed is void; and, therefore, the estate is not misdescribed as the estate of the debtor, although such deed be on record."

The attachment law of New Jersey exists only, I believe, in cases of absconding and absent debtors. The provisions are similar to those upon the same subject under our own statute. (Revision of Laws of 1847, p. 49.)

"The writ shall bind the property and estate of the defendant so as aforesaid attached from the time of executing the same." There are provisions for trying a claim of property by a jury.

By section 28, the proceeding cannot be discontinued without the consent of all the creditors who have applied to the Court or Auditors. Proceedings are taken before Auditors to call in the creditors, and the fund is distributed among them.

The case of *Hunt v. Field*, (1 Stock., 36,) so much relied upon by the defendants, and the two cases cited by the learned Chancellor of New Jersey, are open to the remark that the process was to operate like a bankrupt act, and any creditor coming in could continue it in force. Yet with every qualification which may be suggested, the cases prove that the lien by an attaching creditor is enough to enable him (suing on behalf of himself and all others, &c.,) to obtain the aid of the Court of Chancery to

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interfere with the acts of an alleged fraudulent assignee; to protect the property, and by bringing in the debtor and assignee to settle the question of fraud and of indebtedness in one suit.

Dixon v. Hill et al., (5 Mich. R., 404,) was as follows: On the 2d of August, 1856, a general assignment was made by Lewis, which was conceded to be fraudulent on its face, as authorizing a sale on credit. The assignee sold goods to the plaintiffs below upon a credit in notes of twelve, eighteen, twenty-four and thirty months. The sale was on the 24th of September, 1856. On the 3d of October, the goods were attached by the defendant as Sheriff as the property of Lewis. The plaintiffs below, the purchaser, had taken possession of the goods, but had not given the notes. An inventory was being made. The Court held, that no one but a creditor or purchaser for value could claim title to property, which had been fraudulently assigned, against the action of an attaching creditor, and the plaintiffs were not such purchasers before payment.

There is nothing in the statute of Michigan which renders the principle of this decision dependent upon any special provision. (Laws of Mich., 1846, p. 114, ch. 140 of Compiled Laws.)

In *Peay v. Morrison's Executors*, (10 Gratt., 149,) Austin Peay had executed a deed to his son William. The executors of Morrison commenced a suit by attachment in equity, to set aside the deed and for payment of their demand, which was of an equitable nature, and by a creditor at large. The Court say: "The defendant below being a citizen of a foreign State, sufficient ground was shown to authorize the plaintiffs to assail the deed, notwithstanding they had not recovered a judgment for their demand.

That demand was of a clearly equitable nature; and the provision of the statute of Virginia is, that equitable claims for money or property may be enforced by suit and attachment in Chancery, upon affidavit being made as in actions at law. (R. S., Va., 1849, p. 605.) The provisions and object of the Virginia statute are similar to those of the Code, an auxiliary remedy to an action for the benefit of the particular creditor.

Eaton v. Cooper & Smith, (29 Vt., 444,) was this case: The action was trespass for taking goods. The plea of the general issue was accompanied with a notice that the defendant Smith,

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as Deputy Sheriff, had attached the property as belonging to Kimball, by direction of the defendant Cooper, attorney of creditors of Kimball, and that the property belonged to Kimball. The plaintiff claimed under an execution against Kimball, and a purchase upon the same. The attachment was made on the 18th of February, 1852. Testimony was given tending to show fraud in the purchase by the plaintiff; that it was a cover for Kimball's use, and to defeat creditors. The Judge left this question to the jury, instructing them that if they found this to be the case, the plaintiff could not recover. This ruling was not disputed in the Court above, but a new trial was granted on a point connected with the misuse of the process by the defendants themselves, evidence as to which had been excluded.

The statute law of Connecticut recognizes two kinds of attachment. The first is the process for commencing an action. "Attachments may be granted against the goods and chattels of a defendant, and for want thereof against his lands, or against his person when not exempt from imprisonment on execution in the suit." (Compilation of 1854, p. 51.) Provisions are made for security, and for the mode of attaching real and personal estate. No estate attached is to be held unless execution is taken out within sixty days after judgment. These enactments regulate the law in the cases in which an attachment is the process for commencing a suit, and for the benefit of the particular creditor. There are other distinct provisions termed Foreign Attachments. (Laws of 1854, p. 130.) Under these, effects in the hands of a Trustee are to be attached to answer the judgment if recovered.

The following cases, out of many upon the subject in the Courts of Connecticut, may be referred to as very pertinent. In *Potter v. Mather*, (24 Conn. R., 551,) the action was trespass against the Sheriff and certain attaching creditors of one Potter. Evidence was given to show that the sale to the plaintiff by the debtor Potter, was in fraud of creditors. The Judge at the trial left the question of fraud to the jury. The Court above supported his charge. "The question was, whether there was a change of possession, and whether the sale was fraudulent and void as against the defendants, who were attaching creditors."

Peck v. Whiting, (21 Conn. R., 206,) was trover by assignees of a debtor under an assignment for the benefit of creditors.

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The defendant, a Deputy Sheriff, claimed that the assignment was void against the attaching creditors, and various facts were relied upon at the trial to prove this. The whole case turned upon the point of fraud in the transfer. "The question was, whether the goods could be held by the attaching creditors against the plaintiffs who claim under a previous assignment."

Beers v. Lyon, (21 Conn. R., 609,) is a case of a similar character. It arose in trover against a Deputy Sheriff to recover goods taken by him under an attachment, and he defended on the ground of the fraudulent nature of the assignment to the debtor.

I do not know of any distinction between this part of the law of attachment in Connecticut and that under our own Code, except that in the former an attachment commences an action. Under the Code it is a remedy auxiliary to an action. I do not see any reason why the cases cited are not applicable on this account.

The case referred to, before Vice-Chancellor SANDFORD, (*Falconer v. Freeman*, (4 Sandf. Ch. R., 565,) is an express authority that a creditor taking out an attachment under the act relative to absent and concealed debtors obtained such a lien upon the property as enabled him to file a bill in Chancery to enforce and protect his lien, against fraudulent obstructing transfers, by means of an injunction or otherwise. The bill was by the attaching creditors, before trustees were appointed. The case is open to the remark that it was under the general act, operating as an insolvent or bankrupt act. It does not appear to me that this makes a valid and sufficient distinction.

The learned counsel of the defendant has referred us to an ancient record of the usages and customs of the Burgh of Yarmouth. (Bloomfield's History of Norfolk, vol. II, pp. 337, 341.) The custom of attachment is recognized as having prevailed there as early as the reign of Edward I. The course of proceeding is stated with marked precision; and among the provisions is one, in substance, (article 13,) that, "whereas divers times goods and chattels attached are supposed to be the goods of others, not of the parties defendants, in such cases the parties claiming to have property to those goods, to defeat the attachment made, and the actions and recoveries had by force thereof, are to be sworn in

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open Court, that the property which he or they claim in such attached goods is only upon good cause and consideration, without fraud, covin, or deceit." The claimant was to enter his plea in Court to that effect. If contested, issues were to be joined upon the plea, and a jury impaneled to try them. If the property was found in the claimants, according to the plea, the goods were to be released from the attachment and restored. Another clause provides for security being given by the claimants, whose property is supposed to be without fraud or covin, in special cases of injury from the property being withheld, that they will proceed to try the question of property within a certain limited time.

I think, also, that the case of *Barber v. Devans et al.*, cited by Mr. Locke, (On Attachment, p. 41, note 5,) contains a principle to sustain this defense. On a plea of *nihil habent*, by garnishees, a question of fraud in the debtor in obtaining money which came to the garnishees' hands was tried.

The numerous authorities cited by the defendants' counsel as to attachments under the non-imprisonment act and other statutes, contain some strong expressions of the Judges in support of their position. I have examined most of them. That of *Van Etten v. Hurst*, (6 Hill, 311,) states the proposition distinctly, and that of *Van Kirk v. Wilds*, (11 Barb., 520,) may be considered as exactly in point. The necessity of proving a debt, independently of the plaintiff's affidavit, noticed in some of them, (25 Barb., 29,) is obviated in the present instance by the admission that the plaintiffs were simple contract creditors.

The legal rule established in *Frisbey v. Thayer*, (25 Wend., 396,) that a landlord with a distress warrant does not stand in the situation of a judgment and execution creditor, seems to me to furnish but a slight analogy to the present question, and to be very far from determining it.

A new trial must be had

MONCRIEF, J., concurred in the result.

New trial ordered. costs to abide the event.

CROSBY *et al.*, Plaintiffs and Respondents, v. THE NEW YORK MUTUAL INSURANCE COMPANY, Defendant and Appellant.

1. In an action upon a marine policy upon a ship, to recover for a total loss, the ship having sunk at sea, it is not a defense that the insured sold and transferred his interest in her before she sunk, where it is shown that, prior to such transfer, she received an injury from the perils insured against, which rendered it impossible to keep her afloat, and made her subsequent actual loss inevitable.

2. Where a vessel is so injured by the perils insured against that the assured has no means of saving her, and she subsequently sinks solely in consequence of such injury, the loss of the assured, from the time such injury is inflicted, is, practically and in substance, total, notwithstanding he may, in ignorance of the facts, have sold and transferred his interest in her after she received such injury, and before she was actually sunk.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONROE, J. J.)

Heard, June 15; decided, November 26, 1859.

THIS is an appeal by the New York Mutual Insurance Company, the defendant, from a judgment in favor of Seth Crosby, Ferdinand Crocker, and George Lovell, composing the firm of Crosby, Crocker & Co., the plaintiffs, entered on a verdict rendered on a trial had before Mr. Justice PIERREPONT and a jury, on the 21st of May, 1858.

The action was commenced on the 5th of November, 1856, on a Policy of insurance on the ship *Adriana*, for a voyage at and from New York to San Francisco and Benicia, and at and thence, &c. The Policy is dated March 21, 1856, and in it the vessel is valued at \$10,000, the sum insured. The insurance is, in terms, "on account of whom it may concern," and the loss, if any, is payable to the plaintiffs. The action was brought to recover for a total loss. The complaint states that the insurance was made for the account of the plaintiffs, who, then and since, were interested in, and had a lien on, the vessel, her tackle, &c., to the amount of \$10,000, together with all prior insurance thereon, "which interest was and is, by reason and by means of advances and supplies and outfits furnished by said plaintiffs to said vessel for said voyage," and also as trustees for C. C. Duncan, mortgagee in possession, and also as trustees for David Crocker, William D.

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Crooker, Thomas D. Wilder, Augustus Palmer, Howard P. Wiggin, Samuel Swanton 2d, Horace Parlin, Silas W. Parlin, William H. Parlin, Theodore Ripley, and Isaac Preble, part owners of said ship, and also as trustees of W. S. Lindsay, Edgar P. Stringer, George Gladstone, and Edward Pembroke, mortgagees and bottomry holders in possession of said ship.

The answer denied all the allegations of the complaint, and alleged that the ship was unseaworthy.

At the trial, the defendants, when the cause was opened, stated "that they now admitted their liability for three-fourths of the loss, and only offered defense as to one-fourth, and that they defended as to this one-fourth solely on the ground of change of interest as to this one-fourth, after the inception of the Policy and before the loss." The Policy, the protest of the master and mariners belonging to the ship, and the ship's register, were read in evidence, and proof was given of service of the protest as proof of loss, and of a certified copy of the register as proof of interest. Depositions as to the fact of a loss and its cause were read. It was proved that the vessel encountered a storm on the 16th of April, and sunk on the 6th of May, 1856. It was also proved that William D. Crooker, a registered part owner, by a bill of sale, dated April 18, 1856, conveyed one-eighth of the ship to George W. Kendall and John G. Richardson; and that David Crooker, a registered part owner, by a bill of sale, dated April 21, 1856, conveyed one-sixteenth to the same parties; and that Theodore Ripley, a registered part owner, by a bill of sale, dated April 17, 1856, conveyed one-sixteenth of the ship to said Kendall and Richardson; and that these three bills of sale were delivered on the 24th of April, 1856. The plaintiffs' claim, by reason of the stores and ship-chandlery furnished the ship for the voyage, and their lien on the ship therefor was proved to be \$4,161.50, with interest from March 19, 1856. The other facts material to be known are sufficiently stated in the charge of the Judge.

The defendants requested the Judge to charge,

"That the defendants under this policy are liable only for the proportions of the interests existing at the time the insurance was made, subsisting at the time of the loss, and that the plaintiffs must prove the interests as alleged in their complaint, and can recover only for such interests existing at the time of the

insurance, and averred in the complaint, as subsisted at the time of the loss.

"That the change of interest by the conveyances to Kendall and Richardson, by the bills of sale of April, completed by the 24th of April, precludes any recovery but for three-fourths of the amount insured.

"That the existence of the mortgages on the vessel is immaterial, the Company being bound only for the shares of the ship in which the owners' interest, covered originally by the policy, subsisted at the time of the loss."

The Judge refused to charge the jury otherwise than as hereinafter stated, to which refusal defendants' counsel then and there excepted.

The Judge in charging the jury spoke as follows:

"You will be very much limited in your inquiry in this case, as the questions are few indeed upon which you are to pass at all. There is no dispute about the loss of the vessel, about the insurance, and the question of seaworthiness is not made.

"The defense is, that on the 24th of April, there was a change or sale of a quarter interest of the ship, and that in consequence of that change (the Insurance Company never having given assent to it one way or the other) this policy does not cover the interest of parties who acquired it on the 24th day of April. They claim that the loss happened on the 6th of May following, and consequently that the parties who got one-fourth on the 24th of April were not insured under this policy. The plaintiffs on the other side contend, 1st, that this change of interest does not affect the recovery, and 2d, that this loss did occur on the 18th of April, prior to this transfer of the one-fourth interest. It is very clear that the ship went down on the 6th of May, and if you believe the testimony, it is very certain that she encountered a severe thunder storm on the 16th of April, as she was bound around Cape Horn, going south, and sprang a leak. On the 18th of April there was another storm, which increased the leak, and on the 21st or 22d of April, after a consultation of the officers of this vessel, they came to the conclusion to put in to the nearest port for safety, and they made for Bermuda. But the wind changed, and they were not able, as they supposed, to make that port with safety, and they turned about for another

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port, and sailed for Halifax. The rest of the testimony is all before you. The mere fact that the vessel sank on the 6th of May, does not prove that she was not destroyed so far as to be covered by this Policy at an earlier date; the vessel might have been injured days before she went down, and though she did not sink until sometime after the injury, yet the ruin might have been done at the time she received the injury as effectually as though the vessel had gone down on the same day, if she did sink solely in consequence of that injury.

"If the hands had all left the vessel on the 18th when they encountered this storm, and the vessel had tossed about for some time, and then gone down; yet if the injury which caused her to go down was such as to excuse the desertion and to cause the destruction, this loss did occur in contemplation of law before the 24th of April; so that, if you come to the conclusion that the storm which she encountered on the 16th or 18th of April, or at any time prior to the 24th of April, produced the fatal injury to this vessel, which caused her to sink, then the plaintiff is entitled to your full verdict in any view of the law which has been presented. But if you should come to the conclusion that she was lost in consequence of the storm that occurred after the 24th of April, after the transfer of the one-fourth interest, then your verdict will be for three-fourths; otherwise for the whole amount claimed. I do not see that I need to comment at all upon this evidence; it has been clearly presented; it has been nearly all in writing, and distinctly read; you will observe that the storm commenced on the 16th, and that on the 22d of April they put about for a port of necessity; on the 6th of May the vessel went down; you have heard that described; if you come to the conclusion that she received her fatal injury (as heretofore explained) prior to the 24th of April, your verdict will be for the plaintiff, for the whole amount; but if you come to the conclusion that the fatal injury was received after that date, your verdict will be for three-fourths, and the calculations can be made by the counsel without detaining you."

The defendants' counsel then and there excepted to so much of the charge of his honor the Judge:

1. As instructed the jury, that "the mere fact that the vessel sank on the 6th of May, does not prove that she was not des-

troyed so far as to be covered by this Policy, at an earlier date; the vessel might have been injured days before she went down; and though she did not sink until sometime after the injury, yet the ruin and damage might have been done at the time she received the injury as effectually as though the vessel had gone down on the same day, if the vessel did sink solely in consequence of this injury."

2. As instructed the jury, that "if you come to the conclusion that the storm which she encountered on the 16th or 18th of April, or at any time prior to the 24th of April, produced the fatal injury to this vessel, which caused her to sink, then the plaintiffs are entitled to your full verdict in any view of the law which has been presented. But if you should come to the conclusion that she was lost in consequence of the storm that occurred after the 24th of April, after the transfer of the one-fourth interest, then your verdict will be for three-fourths, otherwise for the whole amount claimed."

3. As instructed the jury, that "if you come to the conclusion that she received her fatal injury as heretofore explained, prior to the 24th of April, your verdict will be for the plaintiffs for the whole amount; but if you come to the conclusion that the fatal injury was received after that date, your verdict will be for three-fourths."

The jury rendered a verdict in favor of the plaintiffs for the full amount claimed, ten thousand two hundred and twenty-seven dollars and sixty-six cents (\$10,227.66.)

A stipulation was entered into between the parties, by which the defendants paid three-fourths of the verdict, and the plaintiffs were permitted to enter judgment, in form, for the other fourth and costs, and the defendants appealed from the judgment so entered, in order to test the question of their liability for the remaining one-fourth. The stipulation provided that if the defendants succeeded on the appeal, the plaintiffs should not be entitled to costs previous to the appeal, and that the costs of the appeal should abide the event.

Wm. M. Evarts, for defendants, (appellants.)

I. The insurance having been effected upon the interest of the owners, and the owners of one-fourth part having by the bills

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of sale, made respectively on the 17th, 18th and 21st of April, and delivered and recorded on the 24th, conveyed away all interest in that portion, the plaintiffs can recover under the Policy for three-fourths only, unless the *Adriana* became a total loss prior to such conveyance.

1. The interest, in respect of which the insurance was effected, must, in order to entitle the insured to recover on the Policy, be a subsisting interest during the risk, and until and at the time of the loss. (1 Arn. Ins., 231; Phil. Ins., §§ 87 and 185, and cases cited; *Powles v. Innes*, 11 Mees. & Welsb., 10; *Carroll v. Boston Marine Ins. Co.*, 8 Mass., 515; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick., 258.)

2. The complaint avers interest in the plaintiffs as trustees of the parties who conveyed the fourth part in question to Kendall & Richardson.

II. The vessel insured had not become a total loss when the change of interest in the one-quarter was effected.

1. The complaint alleges the loss to have taken place on the 6th of May, and not before.

2. When the transfer was made she was still a ship, water-borne, pursuing her voyage, and transporting her cargo; and, as to the one-quarter, she was sold as such.

3. At no time between the discovery of the leak and the transfer was the condition of the ship such as to justify an abandonment to the underwriters, for prior to May 1st she could be kept free from water.

4. The case is to be considered as if the policy upon the one-fourth had expired at the time when the sale was effected; the insured could not, under such a policy, recover for a total loss on a vessel which continued on her course in the condition of the *Adriana* a full week after the termination of the risk. (*Meretony v. Dunlop*, 1 T. R., 260; Arn. Ins., 451, 452; Phil. Ins., § 1148.)

III. If it were true that she was fatally damaged or received her death blow on the 16th of April, or at any time before the transfer, still the fact that the quarter was sold and the price received, would preclude the possibility of a recovery under the policy by the vendors for a total loss. They sustained no loss, and there is nothing for which they could ask indemnity. The

plaintiffs representing the vendors, as trustees, can recover no more than the vendors could.

1. The owners of the portion sold have received their own price for it, as acknowledged by the bills of sale, and on their behalf, the plaintiffs are struggling to make the insurers pay for it again.

2. The purchasers of the quarter in question might have insured that portion, and would have been entitled to recover for a total loss. There cannot be two parties with an insurable interest as owners of the same subject, and so entitled to exact double indemnity for its loss.

3. The plaintiff's fallacy consists in confounding the fatal damage to the structure of the ship with actual loss to its owners of their property in it.

IV. The Court below erred in directing the jury to find for the plaintiffs for the full amount claimed, if they came to the conclusion that the *Adriana* received her fatal injury prior to the 24th of April. There is no evidence in the case to justify such a finding, or to warrant the submission of the question to the jury.

1. No leak was discovered prior to the morning of the 19th of April, and up to that time the ship had encountered no unusual perils, except upon the 16th, "heavy rain and lightning," which, however, could not have caused the leak.

2. After the discovery of the leak, and before the storm of May 1st, the ship met with no disaster or storm or bad weather or extraordinary peril, and was all the while kept free from water.

3. During this whole interval she was daily within reach of assistance, but her officers spoke no vessel and sought for no assistance, and made no efforts to lighten or relieve their ship until after the storm of May 1st.

4. The proximate cause of the loss, the real death blow, was the hard gale from the eastward of May 1st, which continued until the 3d. This caused the ship to labor very heavily, and first made the leak dangerous. It was followed by the bursting of the pump on the 4th of May, and not till then did the ship become unmanageable.

V. If the vessel can in any sense be said to have become a total loss at any time before the transfer of the quarter in dispute,

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the price received by the owners of that portion as ascertained by the bills of sale, was in the nature of salvage, and went as such by abandonment to the underwriters, and this amount should have been accounted for to the defendants, and their proportion deducted from the verdict. (2 Phil. Ins., § 1714; 2 Arn., p. 1178, and cases cited.)

The judgment should be reversed; and under the stipulation the complaint dismissed, with costs of the appeal.

Dexter A. Hawkins, for plaintiffs, (respondents.)

Insisted that a change of interest as to the one-quarter, after the inception of the risk, and before the loss, does not terminate the Policy *pro tanto*, but that it continued in force for the benefit of the purchasers, and that the plaintiffs may sue on it for the benefit of such purchasers. (*Sparks v. Marshall*, 3 Scott, 174; 2 Bing. N. C., 774; *Perchard v. Whitmore*, 2 Bos. & Pul., 155.)

That even if such transfer terminated the Policy, *pro tanto*, as to such owners, still it continued in force to cover the merchant's lien for outfits supplied on the credit of the vessel for this voyage; and that those having such lien were parties concerned at the date of the Policy, and up to and at the time of the loss. (1 Arn., 219, 252; *Irving v. Richardson*, 1 M. & Rob., 153; 3 C., 2 B. & Ad., 193; 4 Dall., 424; 3 Burr., 1394; 1 Bos. & Pul., 316.)

That the verdict is conclusive that the fatal wounds on account of which the vessel was lost, were received by her in the storm of the 16th and 18th of April, and before the 24th. She was, for any beneficial purpose, as completely out of existence then as though at the bottom of the sea, where she soon sunk. The subsequent transfer (and which was made under a mistake of facts) could not in any way affect the defendant's liability for the loss or damage previously sustained, and that loss was in substance total. (*Barr v. Gibson*, 5 Mees. & Wels., 390; 2 Duer on Ins., 5, 6; *id.*, 570; *Coit v. Smith*, 3 Johns. Cas., 16; *Howell v. Protection Ins. Co.*, 7 Ohio R., 284; 4 Kern., 143; 2 Arn., 1000-1004; *Roux v. Salvador*, 3 Bing. N. C., 266; *Mellish v. Andrews*, 15 East, 15; *Hare v. Travis*, 7 B. & C., 14; 1 Phil. on Ins., 706, 707.)

BY THE COURT—MONCRIEF, J. The words in the Policy, "for whom it may concern," must be applied to the interest of the parties, and only the parties for whom it was intended by the person who effects or orders the insurance. (7 Har. & Johns., 417; 2 Caines, 203; 4 Wend., 75; 8 id., 144; 24 id., 276.)

Those terms are always controlled by proof of the parties for whose benefit the insurance was in fact intended. (*Sharp v. Whipple*, 1 Bosw., 567.) Proof was given showing that William D. Crooker, David Crooker and Theodore Ripley were the owners of the one-fourth interest in said vessel up to the 24th of April, 1856, on which day bills of sale therefor (of previous dates) were delivered to Kendall & Richardson, the purchasers.

On the opening of the case on behalf of the plaintiffs, the defendants stated that they defended as to this one-fourth solely, on the ground of change of interest as to this one-fourth, after the inception of the Policy and before loss.

The jury, upon the evidence in the case, found, as a matter of fact, that the vessel, "before the 24th of April, received the fatal injury which caused her subsequent loss by sinking, on the 5th or 6th of May following."

The vessel having received a death wound before she was sold, then it is true that by the perils insured against she was damaged while owned by the insured, and they should recover to the extent of that damage, though they sell her subsequently and before the destruction is visibly complete.

The question then arises, what, on such a state of facts, was the extent of the damage or the loss? Wherever it appears that neither the assured nor the underwriters could exercise any control over the vessel, and that in the course of the voyage the vessel had been placed in such a position that it was totally out of the power of the assured or the underwriters to procure her arrival, the voyage being arrested and the vessel receiving a damage which, considering its nature, rendered it certain that she could not reach her original destination, the loss is absolutely and of itself total, independently of the election of the assured to treat it as such.

The loss is in its nature total to him who has no means of recovering his property, whether his inability arises from its annihilation or from any other insuperable obstacle. (It is only

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in case of a constructive, not of an absolute total loss, that an abandonment is necessary.) (1 Curtia, 152; 9 Barn. & Cress., 411; 2 Maule & Selw., 240; Park., 169; 3 Bing. N. C., 266; 14 Conn., 50.)

If the damage was such that the vessel could not get into port, but sunk at sea, the loss was practically total, and in substance and good sense amounted to the sum insured, and the defendants are bound by the very terms of their contract to pay the whole sum insured. (3 Johns. Cas., 16; 3 Bing. N. C., 266; 6 Mass. R., 465; 7 Ohio R., 288.)

No cases say that the bare existence of the hulk, "the mere congeries of plank and iron" of the ship, prevents the loss from being total.

The exceptions, therefore, not being well taken, the judgment will be affirmed in conformity to the stipulation between the parties.

Judgment was ordered accordingly.¹

**ISAAC N. STODDARD, Plaintiff and Respondent, v. SAMUEL
ROTTON, Defendant and Appellant.**

C, an owner of land, conveyed it by a deed, absolute on its face, to W, and W at the same time executed and delivered to C a written defeasance which made the deed, as between the parties to it, a mortgage; the deed was recorded as a deed, and the defeasance was not recorded. W subsequently conveyed in fee to the plaintiff, who paid the agreed price, and recorded his deed, without having any notice of the defeasance.

1. *Held*, that the plaintiff, having bought in actual good faith, acquired a title perfect as against C, and as against the defendant, C's remote grantee under deeds subsequent to the plaintiff's deed, notwithstanding the defendant took his deed and paid the consideration without actual notice of the deed from W to the plaintiff, or of the defeasance.
2. That 1 Revised Statutes, (p. 756, § 3,) which is to the effect that a grantee in a deed intended as a mortgage, unless he records it as a mortgage, and also records therewith and at the same time the writing operating as a defeasance of the same, shall not derive any advantage from the recording

¹ The case of *Duncan et al. v. The Great Western Insurance Company*, was argued at the same term as the above, involved substantially the same questions, and was similarly decided.

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thereof, cannot be construed as operating to defeat the title which the plaintiff thus acquired from W.

3. Where, on the trial of an action of ejectment, the defendant is permitted to amend his answer, and allege that his possession is that of a mortgagee in possession, the plaintiff may, in the discretion of the Court, amend his complaint so as to convert the action into one to redeem from the defendant as a mortgagee in possession. (Per HOFFMAN, J.)
4. *Held*, also, that the defendant could not be treated as a mortgagee in possession, by force of the deed from his immediate grantor, although such grantor, subsequent to receiving a deed from C, and before conveying to the defendant, had a mortgage assigned to him which was a lien on the premises when C conveyed to W, and remained partly unpaid; that such mortgage was extinguished by the conveyance with warranty to the defendant, as between the latter and his immediate grantor.
5. The Referee having treated the defendant as a mortgagee in possession under said mortgage, and having decided that the plaintiff pay to the defendant the amount found due thereon, as a condition of recovering possession: *Held*, on an appeal taken by the defendant, that there was no error to the prejudice of the latter, and that the judgment be affirmed.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, October 21st; decided, November 26th, 1859.

THIS is an appeal by the defendant from a judgment entered on the report of J. C. Bancroft Davis, Esq., as Referee.

The complaint, as originally framed, states that the plaintiff, on the 3d of September, 1854, was seized in fee of certain real estate therein described, being a lot in Eighteenth street, between Second and Third avenues, New York city; that the defendant, on the 6th of June, 1856, entered into possession, and unlawfully withholds possession, to plaintiff's damage, and prays that plaintiff "be adjudged to recover of said defendant the said real property and the possession thereof," with costs.

The answer, as originally framed, *first*, denied each and every allegation of the complaint. It alleged, *second*, that the defendant, "on or about the 5th of June, 1856, became seised in fee and possessed of the real property referred to in the complaint, and ever since has been and now is the owner thereof, and entitled to its possession."

The action was referred on the issues thus joined; and, during the trial, the answer was amended, on defendant's motion, against plaintiff's objection and exception; and, thereupon, the complaint was amended against defendant's objection and exception. The nature of such amendments is hereinafter stated.

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From the facts found by the Referee it appears that the lot in question is part of the Stuyvesant estate; that it was conveyed by Gerard Stuyvesant and wife, December 1, 1848, to William Smith Brown, who gave back to Stuyvesant a mortgage for \$4,700, which mortgage was in force and unpaid when this suit was brought. Such deed and mortgage were recorded December 12, 1848.

That, on the 1st of June, 1850, Brown, having a perfect title, subject to the mortgage for \$4,700, by a deed signed by himself and wife, conveyed the premises to Edward Crane in fee, who executed a mortgage to Brown for \$4,800, part of the consideration money; which deed and mortgage were recorded on the day of their date.

Crane and wife, by a deed dated September 27, 1852, conveyed the lot to H. Willis in fee, for the expressed consideration of \$10,000, which was duly recorded as a deed October 2, 1852. Willis, at the same time, executed and delivered to Crane a paper, writing or defeasance, not sealed, which made the deed from Crane to Willis, as between the parties to it, in effect a mortgage. This defeasance was never acknowledged or recorded.

On the 25th of August, 1854, Willis, by deed of that date, conveyed the lot in question to the plaintiff, which deed was duly recorded September 2d, 1854. The plaintiff, on receiving such deed, paid the consideration in full, and had no knowledge or actual notice of the defeasance until some time after the deed to him had been recorded. These conveyances constitute the plaintiff's title.

On the 1st of June, 1850, William C. Burke and wife—William C. being a brother-in-law of said Edward Crane—went into possession of the lot, and continued in possession, with Crane's assent, until March 17, 1855, and from that date until June 12, 1856, claimed that Burke's wife owned the lot in fee.

On the 17th of March, 1855, said Crane and wife, by deed of that date, conveyed the premises in fee to Sarah Elizabeth Burke, the wife of said William C. Burke, which deed was recorded on the 25th of April, 1855.

On the 13th of April, 1855, William Smith Brown, by deed, assigned the said mortgage for \$4,800 to one Charles Ely, there being then \$1,000 and some interest due thereon. That assignment was recorded on the day of its date.

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On the 3d of May, 1856, the defendant and William C. Burke entered into an agreement for the purchase by the former of the lot in question.

On the 31st of May, 1856, Ely, by deed, assigned to said Sarah Elizabeth Burke the said mortgage for \$4,800; and that deed was recorded on the day of its date.

On the 4th of June, 1856, Burke and wife, by deed of that date, containing full covenants against everything except the said \$4,700 mortgage from Brown to Stuyvesant, conveyed the lot in question to the defendant in fee, who thereupon paid the agreed value in full. He did not know of the deed from Crane to Willis, or from Willis to the plaintiff, until after he had paid for the lot. Since the 12th of June, 1856, the defendant has been in possession, receiving the rents and profits.

By the amendment of the answer which the defendant was permitted to make during the trial, he alleged and, having thus amended, proved, the facts before stated as to the execution of the mortgage by Crane to William Smith Brown for \$4,800; the transfer of it by Brown to Ely, and by Ely to said S. E. Burke, and that the latter was in possession when it was so assigned to her; the amount owing thereon; and the deed from Burke and wife to the defendant.

The amendment which the plaintiff was permitted to make to his complaint is to the effect "that the value of said premises is \$10,000, or thereabouts, and the value of the yearly rents and profits is \$1,000;" with the addition, to the prayer for relief originally stated, of a prayer for general relief.

The Referee took evidence as to the amount due on the said mortgage for \$4,800, and as to the rents and profits received by the defendant, and his disbursements on account of the premises while he was in possession; and found that the balance due on said mortgage, at the date of his report, (April 25, 1859,) was \$113.60.

He found, as conclusions of law, that the plaintiff acquired a perfect title, subject to the two mortgages for \$4,700 and \$4,800; that the title to the \$4,800 mortgage and the moneys due had been vested in the defendant, and that the balance due to him must be paid before the plaintiff recovered possession; that the defendant, at the time this suit was commenced was, and since

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June 12, 1856, had been, in possession, and was and is accountable as a mortgagee in possession; that the plaintiff recover possession on paying the balance due on the \$4,800 mortgage; and that the plaintiff also recover his costs of the action. The defendant duly excepted to the decision of the Referee: some exceptions, which were taken during the progress of the trial, are not stated, as they are not discussed in the opinion delivered.

From the judgment entered according to the decision, the defendant appealed to the General Term.

C. C. Langdell and *F. W. Burke*, for appellant.

William Allen Butler, for respondent.

BY THE COURT—HOFFMAN, J. The first and main question is, what was the effect of the omission of Crane to record the defeasance given to him by Willis?

Both parties claim under Crane, who, it is admitted, was seised in fee after June 27, 1850, subject to the mortgage of \$4,700 given by Brown to Stuyvesant.

The deed of Crane to Willis of September 27th, 1852, and the defeasance of the same date made by him, constituted, as between those immediate parties, a mortgage, or conditional sale. (1 R. S., 756, § 53; *James v. Johnson*, 6 John. Ch. R., 417.) So long as *bona fide* purchasers under either party did not intervene, their rights would be governed by the deed and defeasance, whether either were recorded or not.

But Willis records Crane's deed to him on the 2d of October, 1852, in the book of deeds; and Crane omits to record the defeasance at all, or to have it acknowledged or proven.

Then Willis conveys to the plaintiff, for valuable consideration, on the 25th of August, 1854. This deed was recorded September 2d, 1854. The Referee finds that the plaintiff was a purchaser for value, and had no notice of the memorandum, or defeasance, until some time after his deed was recorded and the consideration paid. This finding is supported by the evidence. Crane subsequently conveys to the grantor of the defendant, and the latter is in possession.

The provisions of the statute which bear upon the present question are the 2d and 8d sections of the act "of recording

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conveyance," &c. (1 R. S., 756.) By the second section, "different sets of books are to be provided by the clerks of the several counties for the recording of deeds and mortgages; in one of which sets all conveyances, absolute in their terms and not intended as mortgages, or as securities in the nature of mortgages, shall be recorded; and, in the other set, such mortgages and securities shall be recorded."

The 3d section provides "that every deed conveying real estate which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time."

Under this provision, Willis, for whose benefit the deed was made, could not derive any advantage from the record thereof, unaccompanied with the record of the defeasance. If, for example, Crane had afterwards conveyed or mortgaged the property to a *bona fide* grantee, Willis might have been set aside in favor of that grantee, (notwithstanding the record of the deed to him,) upon discovering the defeasance. The record, *per se*, would not protect Willis; although actual notice of the deed, with actual notice of the defeasance, would, I presume, do so, so as to give him the rights of a mortgagee.

These points seem settled under the former registering acts by the cases of *Dey v. Dunham*, (2 John. Ch. R., 188; 15 Johns. R., 555;) *White v. Moore*, (1 Paige, 551;) *James v. Johnson*. (6 Johns. Ch. R., 417; 2 Cow., 247.)

But a *bona fide* purchaser from Willis finds this deed on record, recorded in the proper book, as an absolute conveyance. He knows nothing to contradict the import of the deed and record, viz.: that Willis was the owner in fee.

It is not contended that Willis could have set up any right against his own grantee. How could Crane do so on his own behalf? He takes the defeasance without acknowledgment, con-

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ceals it, and thus enables Willis to exhibit himself on the deed and the record, as absolute owner.

How can Crane's subsequent grantee be in a better situation? He finds an absolute deed from Crane to Willis on record, and an absolute deed from Willis to the plaintiff. He is chargeable with notice, unless, as the counsel of the plaintiff observes, the effect of the statute is, to annul the record for every purpose; to make the case the same as if there had been no record at all.

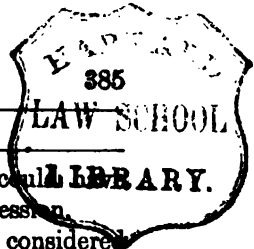
This, we apprehend, cannot be concluded, and we think the case of *Mills v. Comstock* (5 John. Ch. R., 214,) is sufficient to cover and decide the present question. The purposes and scope of the statute are answered, when it is held, that Willis could not support his title against a *bona fide* grantee of Crane, by virtue merely of his recorded deed, and that Crane could not defeat a *bona fide* recorded grantee of Willis by any subsequent grant of his own.

2. It is urged that the possession of Burke, (who was in possession from June, 1850, to June, 1856,) was the possession of Crane, and that when Willis conveyed to the plaintiff Stoddard in 1854, this possession charged the plaintiff with knowledge of Crane's legal position under the defeasance, and there was therefore an adverse possession in Crane which defeated Willis' deed to the plaintiff. (2 R. S., 739, § 147.)

Several answers may be given: a purchaser may be treated as chargeable with notice of the nature of the title of one in actual possession of the land, but we apprehend the rule has never been carried further. If Burke's title would not defeat him, he need not go further. Burke's possession was not under any title which can affect the plaintiff. And the defendant claims under Burke by deed two years after the plaintiff's title accrued, by the deed to him.

Again, to hold that the plaintiff was affected in 1854, by a virtual constructive possession of Crane, with notice of Crane being mortgagee in possession, would be to enable Crane fraudulently to defeat the *bona fide* grantee of his recorded *bona fide* grantee.

Again, in no proper sense within the statute referred to, avoiding a grant, when the lands are held under a title adverse to that of the grantor, can the possession of a mortgagee be deemed ad-



verse to that of his mortgagor. Crane's possession could have been no more than this, if he had been in actual possession.

3. Two other points of the defendant may be considered together, viz., the fifth point of those signed by Mr. Langdell, and the first of those of Mr. Burke, adopted by him. It is contended that the Referee erred in holding that the defendant was accountable in this action, as mortgagee in possession, for the rents and profits of the premises, and that the plaintiff was entitled to recover upon paying to the defendant the balance found due upon said mortgage. The effect of this decision was to convert an action of ejectment into a bill in equity to redeem. The second proposition is, that the defendant was assignee of an unpaid mortgage, in possession when the action was brought, and cannot be dispossessed by ejectment.

A statement of the course of the pleadings is necessary to understand these points.

The complaint and answer, as originally served, are set out in full in the statement of the case.

[The opinion here states the application made by the defendant to amend his answer, and the proceedings then had in respect to the amendment of that, and also of the complaint, and then proceeds as follows:]

The defense thus set up by way of amendment was substantially this: *Third*, That Crane, in June, 1850, executed a bond and mortgage to Wm. Smith Brown for \$4,800, and such mortgage was duly recorded the 27th of June, 1850; that on the 13th of April, 1855, Brown assigned such bond and mortgage to one Ely; that on the 31st of May, 1856, Ely assigned them to Sarah E. Burke; that Mrs. Burke, being in possession after condition broken by reason of the non-payment of the sum of \$1,000, the last installment and interest, with her husband conveyed the premises, by a full covenant deed, with warranty, to the defendant, by deed of the 5th of June, 1856, and that Mrs. Burke was, at the date and delivery of such deed, in possession.

The Referee, as appears by his finding, took testimony upon and considered all the questions which could arise under such pleadings; took an account of the rents and profits on the one side, and of the amount due upon the Brown mortgage on the other; found a balance of \$113.60 due upon the mortgage, and

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gave judgment for possession, upon the plaintiffs paying that sum and the costs of the suit.

These facts present some points of interest.

It is undoubted law, that "when a mortgagor under whom a plaintiff claims has made default, the estate is forfeited at law; the interest which remains in the grantee of the mortgagor is but an equity of redemption; and the owner of such equity could not, after forfeiture, sustain ejectment against the mortgagee in possession, or any one holding under him. He has only the right to redeem in equity." I use the language of DENIO, J., in delivering the opinion of the Court in *Pell v. Ulmar*. (18 N. Y. R., 141.)

But, all the cases cited express the rule as applicable to actions of ejectment before the Code. The case itself does not raise or determine the present question under the Code.

The pleadings, and the testimony admitted, and the facts found by the Referee, present a case which embraces every element of a proper bill to redeem mortgaged premises, in the possession of the mortgagee, or persons under him. There is the allegation and proof of a title in the plaintiff sufficient to authorize him to redeem. There is an allegation and proof of the rents and profits amounting to a certain sum, received by the assignee of the mortgage. There is an allegation and proof of the amount due upon the mortgage. There is a demand for the recovery of possession, and there is a judgment that it shall be recovered upon payment of a balance found due on the mortgage. In this the plaintiff acquiesces. It is the same as if he sought it.

It was settled as long ago as the time of Lord HARDWICKE, that upon a bill to redeem from a mortgagee in possession, the Court, after decreeing redemption, would not drive the party to ejectment to recover possession, but would compel the surrender by its own process. (*Yates v. Hambly*, 2 Atk., 360; *Seaton on Decrees*, 145-147, citing *Onely v. Moor*, 25th Oct., 1742, and *Miller v. Beatty*, 12th Dec., 1746.)

We have under the Code the distinction between legal and equitable remedies abolished, and a uniform course of proceeding in all cases established. (Preamble to Code.) We have the distinction between actions at law and suits in equity extinguished, and but one form of action to enforce private rights. (§ 69.) We have it provided that the plaintiff may unite in the same com-

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plaint several causes of action, whether they be such as have been denominated legal or equitable, or both, in (among other specifications) transactions connected with the same subject of action. (§ 167.) And we find that any relief may be granted consistent with the case made by the complaint and embraced within the issue. (§ 275.)

The amendments by which the complaint was changed and the issues enlarged, have, in fact, converted the case into an action for redemption, and there does not seem to exist any substantial ground in the justice of the case for defeating the plaintiff and dismissing the present action.

In the case of *Davis v. Conklin*, before the present Chief Justice of this Court, an action of ejectment was brought by one who stood in the situation of mortgagor unforeclosed, against parties claiming under a foreclosure which was adjudged invalid. Those parties, however, stood in the situation of mortgagees or assignees of a mortgagee, in possession after forfeiture, and thus could defeat ejectment. The complaint was thereupon dismissed, without prejudice to the right of the plaintiff to bring such new action as he might be advised. The Court suggested that a suit to redeem was the only proper remedy.

No application to amend the pleadings was there made.

The cases of *Marquat v. Marquat*, (2 Kern., 386,) and *Phillips v. Gorham*, (17 N. Y. R., 270,) seem to sanction an amendment of this nature. Yet in *Walter v. Bennett*, (16 N. Y. R., 250,) it was held that a right to recover upon a contract is wholly distinct from a right to recover as for a wrongful conversion of personal property; and if an action has proceeded to trial upon one ground unsuccessfully, it cannot be sustained upon the other.

But if this view is untenable, another appears to me clear. The exception to the amendment moved for by the defendant, and to the testimony under it, was well taken. The defendant claimed to be assignee of the Brown mortgage, by reason of a deed to him, with full covenants from the holder of such mortgage. It is certain, as I think, that a *bona fide* holder, by assignment of that bond and mortgage before the deed, could now assert a claim upon the property under it. I know of no rule of law or equity which would effectually transfer the mortgage to the grantee as against such a purchaser.

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But, again, the operation of the covenants could not be higher than a virtual equitable assignment of the mortgage to the grantee; and it would seem that a merger would then be effected of such incumbrance in the fee; that this would clearly be the case at law, and that there was not sufficient to bring the case within the equitable rule, by which an incumbrance is sometimes held not to have been extinguished. (*James v. Morey*, 2 Cow., 246; 4 Kent's Com., 102, and cases.)

There is, however, a yet more decisive view of the point found in the principle decided in *Mickles v. Townsend*. (18 N. Y. R., 575.) It was held that when a party granted land with warranty, and afterwards acquired a mortgage given by a former owner, he took such mortgage for the benefit of his grantee, and the lien was discharged and acquitted. The line of reasoning pursued by Mr. Justice STRONG, is as pertinent to show that a mortgage in the hands of a grantor at the time of his grant, shall be extinguished as fully as a mortgage subsequently obtained.

It is true that both this learned Judge and Justice DENIO do not consider the doctrine of merger as strictly applicable to the case, because it might be that the grantor intended to keep the mortgage alive, within the case of *James v. Morey*. (2 Cow., 246.) But the doctrine of estoppel did apply, and the subsequent right passes by it.

Whatever be the principle of the decision, it seems to me that the deed with warranty produced between the parties an extinction of the lien at law, and that nothing could have kept it in force but some act of the grantee recognizing and continuing its legal being. Nothing of this kind is in the case, and no presumed intention is warranted.

The result is that the plaintiff was entitled to his judgment even after the amendments of the answer allowed by the Referee. He has consented to modify this absolute right by paying a certain sum to the defendant; consented to put him in a position as if he were mortgagee in possession. The defendant can hardly complain of this.

Several exceptions were taken to the rulings of the Referee during the trial, but none are noticed upon the points.

The judgment should be affirmed.

Judgment affirmed, with costs.

JOHN S. GILES, Plaintiff, v. WILLIAM B. CROSBY *et al.*, Defendants.

1. Where a bond is given by several persons, by the terms of which they obligate themselves to pay a sum therein named, "on the completion of the opening of Canal street and the widening of Walker street, according to the plan now in the hands of Commissioners," &c., and the plan is subsequently, without the consent of the obligors, so changed that a gore of land at the part of Canal street, bounded by Centre, Walker and Baxter streets, instead of being taken and converted into a park, as the original plan contemplated, is not taken, but is left to be built upon, and Canal street is extended an additional distance, and the work is completed according to the modified plan, such obligors are not liable upon said bond.
2. The question of their liability on such bond is not affected by the fact that the change of plan made the improvement less expensive than it would have been if completed according to the plan referred to in the bond.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, October 26; decided, November 26, 1859.

THIS action is brought by John S. Giles, as plaintiff, against Wm. B. Crosby, John C. Beekman, Henry R. Remsen, William Remsen and Frederick Schuchardt, as defendants. It was tried before Chief Justice BOSWORTH and a jury, on the 9th of March, 1859.

It is brought by the plaintiff against the defendants to recover the sum of \$10,000, with interest from March 24th, 1854, and is founded on a bond executed by the defendants to the plaintiff, dated November 8th, 1851, conditioned for the payment by the defendants of \$10,000, on the completion of the opening of Canal street and widening of Walker street, according to the plan then (*i. e.*, November 8th, 1851,) in the hands of Commissioners, for the opening of Canal street into Walker street, and the widening of Walker street. The condition of the bond declared that "these presents are given under the express condition that before the said obligors, or either of them, or either of their heirs, executors or administrators, shall be called upon or bound to pay the above mentioned sum, satisfactory evidence shall be given to them that the said sum of ten thousand dollars was necessarily paid or incurred in order to carry out said plan ;

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the manner of its expenditure or distribution shall also be exhibited and shown to them."

The complaint states that the said opening of Canal street and widening of Walker street was completed according to the said bond and the condition thereof, about September 11, 1854, and that satisfactory evidence was furnished of the actual and proper expenditure of the sum of \$10,000.

The answers of all the defendants, except that of William Remsen, deny these allegations.

The complaint also contained a statement of a second cause of action for alleged work and labor and money paid and expended for the use of the defendants, but no evidence was offered in relation to any subject but the bond and the liability of the defendants thereon.

The answer of the defendant, William Remsen, alleges that the improvement mentioned in the condition of said bond was never carried out, according to the plan therein referred to; but that, after the date of said bond, the plan was materially altered, and without his consent; and that he is absolved from all obligation under said bond, and denies that any evidence was furnished to him of the expenditure of any part of the \$10,000.

On the trial, it appeared that the plan in the hands of the Commissioners at the date of the execution of the bond, was as described in a resolution of the Common Council of New York, passed 1848.

It also appeared that after the execution and delivery of the bond, the plan was, during the year 1852, altered.

That the difference between the original plan and the one subsequently carried out, was:

That the gore of land shown on the map, at the part of Canal street bounded by Centre, Walker and Baxter streets, which was, by the original plan, to be thrown into the street, was not taken and made a park by the subsequent plan; and that Canal street was continued beyond Rutgers street to East Broadway. The width of the street, which was to be seventy-five feet, and its course were not otherwise altered. The changes were, leaving the gore to be built upon, and the continuing of Canal street beyond Rutgers street, a distance of part of a block, to East Broadway.

It was also proved that the plaintiff received notice from the defendants of this change of plan, before the confirmation of the report of the Commissioners, and that they would not assent to it, and considered themselves absolved from all liability by reason of the change; that the plaintiff in reply insisted that they were not discharged from liability.

The plaintiff offered to prove "that by not taking the gore, the cost of the improvement was lessened to the amount of one hundred thousand dollars, and the improvement not injuriously affected thereby." The evidence was excluded, and the plaintiff excepted to the decision.

The defendants, at the trial, moved for a dismissal of the complaint, on the ground that the condition of the bond was not fulfilled, because the plan in the hands of the Commissioners at the date of said bond was not carried out, the gore not being taken in, and Canal street being continued to East Broadway.

The Judge granted the motion, and the plaintiff excepted. The Judge then ordered that the questions of law arising at the trial be first heard at General Term, and that the entry of judgment in the meantime be suspended.

The plaintiff now moves for a new trial on the exceptions, and the defendants for judgment absolute.

William Curtis Noyes and John B. Scoles, for plaintiff.

I. The condition of the bond was fulfilled. What the defendants contracted for was a street seventy-five feet in width, from Centre street to Rutgers street. This they got. That by a subsequent resolution of the corporation of the city of New York, this street was extended half a block further to East Broadway, does not alter it. There was no change of plan in the widening of Walker street, or the extension of Canal street to Rutgers street. It was not an addition to the original plan, but an independent measure, by which the street was carried half a block further, although embraced in the same enterprise about which the plaintiff contracted.

II. The gore of land to be made into a park was no part of the street, nor of opening a street. It was something contemplated to be added to the street. Not taking the gore therefore did not change the plan of the street, or abridge or in any way affect or

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diminish its value as a street. All that the defendant contracted for was a street seventy-five feet wide, according to the plan then in the hands of the Commissioners of Estimate and Assessments, and this they obtained. In truth the non-taking of the gore was an advantage to the defendants, as it lessened the expense.

III. The exclusion of the gore of land, and the extension from Rutgers street to East Broadway, were, by resolutions of the mayor, aldermen and commonalty of the city of New York, over which the plaintiff had no control, and were matters entirely disconnected with the opening of the street contracted for. As they were no part of the opening, and not connected with plaintiff's contract, they cannot prejudice it.

IV. The Judge erred in excluding evidence, that by not taking the gore the expense of the extension and widening was diminished, without injuriously affecting the improvement. Admitting, for the sake of argument, that this was a variance from the original plan, the question is, whether the condition of the bond was not substantially complied with. An immaterial change in the plan, not affecting the value of the improvement, but essentially benefiting the parties who were to pay for it, cannot legally absolve these defendants from the payment of the money secured by the bond. Suppose there had been a change of a few inches in some part of the street proposed to be widened, would that vitiate the bond? It was a question for the jury, whether the defendants had received in substance what they contracted for. The evidence offered by the plaintiff went to show that they had. It was for the defendants to rebut it, and show, if they could, that the alleged change of plan was a material alteration, and injuriously affected the improvement. Covenants are to be construed according to their spirit and intent, and it is sufficient if they are performed according to their spirit and intent, although not according to the letter. (*Marvin v. Stone*, 2 Cow., 781, 786, and cases there cited by Talcot, *arguendo*; Com. Dig., title "Covenant" E.)

V. The bond constituted an agreement between the plaintiff and the defendants for work and labor, in procuring the street to be opened; and the clause in the condition of the bond, that the sum agreed upon was to be paid "on the completion of the opening of Canal street and widening of Walker street, according to the plan now in the hands of the Commissioners for the opening of

Canal street into Walker street, and the widening of Walkerstreet," did not create a condition within the common law rule upon that subject.

1. Such a condition is inapplicable to a contract for work and labor, operating to do injustice, and as a penalty. Penalties under contracts between parties are created only by clear and express words, never by implication.

2. To make it operate as a strict condition, is to make it operate unequally, as well as harshly; for though the defendants have all the street they contracted for, and the consequent benefit stipulated to be given to them, yet the plaintiff is to obtain no compensation, though he has performed all the services his contract called for. (*Campbell v. Jones*, 6 T. R., 570; *Hall v. Cazenove*, 4 East., 477; *Constable v. Clobberlie*, Palmer's R., 397; *McAuley v. Billenger*, 20 Johns., 89; *Ritchie v. Atkinson*, 10 East, 295; *Kemble v. Wallis*, 10 Wend., 374.)

3. To construe it as a covenant for work and labor, demanding only a substantial compliance by the performance of the services contemplated, is to carry into effect the intention of the parties, and to do justice to the plaintiff, while no injustice is done to the defendants, as they have received all the advantages to their property they contemplated.

John Van Buren, for defendants,

Insisted, that inasmuch as it was proved that material changes of the plan were made after the bond was given, without the consent of the defendants, the condition of the bond was never fulfilled, upon which alone the defendants chose to become liable on the bond.

That the testimony offered, as to the effect of the change of the plan upon the expense of the improvement, was properly rejected. That the defendants were the sole and exclusive judges of what plan would benefit them, and for the completion of which they would pay.

That judgment should be ordered for the defendants, according to the decision at the trial.

BY THE COURT—HOFFMAN, J. The plaintiff offered no evidence under the second cause of action stated in his complaint, and it may be dismissed from our consideration.

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One express condition of the bond was, that before the obligors should be called upon to pay, satisfactory evidence should be given to them, that the sum of \$10,000 was necessarily paid or incurred in order to carry out the plan; the manner of its expenditure or distribution shall also be exhibited to them.

The complaint alleges that this satisfactory evidence was furnished, and this exhibition made before the commencement of the action. The answer of all the defendants except William Remsen, by not denying, may be taken to admit this. Remsen puts it in issue. No evidence touching the matter was given on the trial. It would seem to be entirely fatal to the plaintiff's case as against Remsen, that no such proof was given. It is very clear that this was a condition precedent to a recovery, and should have been proved as well as averred.

The answer given to this objection was, that the point does not arise, and cannot be considered here, because the learned Judge had dismissed the complaint on one particular ground, a ground different from that in question.

The course on the dismissal of the complaint is thus stated: "The counsel moved for a dismissal of the complaint on the ground that the condition of the bond was not fulfilled, because the plan in the hands of the Commissioners at the date of the bond was not carried out; the gore not being taken in and Canal street being continued to East Broadway."

"His Honor the Judge granted the motion on the ground that the gore was not taken in, and Canal street was continued to East Broadway, which was not according to the plan of the Commissioners at the date of the bond."

Assuming for the present case, that the Court may not enter upon any other ground which would have justified a dismissal, upon a bill of exceptions, but must limit its view to the question of error or no error in the precise point, we proceed to examine that point.

It seems to us clear that the alteration in the plan, particularly by the omission to take the gore, one side of which was on Centre street, was a material alteration. It was a deviation from the plan originally resolved upon, and on the execution of which the defendants were to be bound for a sum of no slight character. No one could pretend to say, that it was so indifferent and unim-

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portant as that the conclusion would be irresistible, that the defendants, had it been so proposed originally, would have entered into the same contract. This appears to me to be the true question to be solved.

If a jury had given a verdict for the plaintiff upon the question being left to them, whether the change was material in view of the condition of the bond, it would have been set aside. The case of *Pullman v. Corning*, (5 Seld., 98,) and the cases there cited contain the principle governing the present. A partial fulfillment of a contract, a deviation from a contract has been held in some leading cases to preclude a recovery where, undeniably, much injustice was done by the strict enforcement of the rule. We are left to conjecture as to the positive loss or injury sustained in the present case.

That the plaintiff neither procured the alteration nor could have prevented it is no reply to the objections against his recovery. His undertaking implied the power to accomplish the work in the mode prescribed, or made payment to depend upon the success of his efforts. It would have been different had the defendants been accessory to the change.

The judgment must be ordered for the defendants, with costs.
Judgment for the defendants.

TRAVERSE H. READ *et al.*, Plaintiffs and Respondents, *v.* MORRELL B. SPAULDING, Defendant and Appellant.

1. A party doing business under the name and style of "Spaulding's Express Freight Line," and in that name receiving goods at New York "to be forwarded by Spaulding's Express to" Louisville, without liability for damage, "if delivered at Louisville depot in good order," without liability "for wrong delivery of goods marked by initials, or, "for wrong carriage of goods that are imperfectly marked," and in case of loss or damage for which Spaulding's Express may be liable, stipulating that the latter shall have the benefit of any insurance affected by the owner, is a carrier of goods and not a forwarder merely, notwithstanding he employs the conveyances of third parties only, (Railroad Companies, &c.,) in the performance of his contract.

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2. Where goods in a railroad depot near a river were injured by an extraordinary flood, rising higher than any flood had ever risen before, which it was no negligence not to anticipate, and from which, when the rise of the water became apparent, the goods could not be delivered, if the carrier in the due discharge of his duty had the goods in the regular and usual course of transportation so that their being in the depot at the time was proper, the injury is by the act of God in such sense that the carrier is excused.
3. But it is the duty of the carrier to carry and deliver within a reasonable time, and if, when the goods were in the depot and the flood came, he had violated his duty and was under the actual pressure of fault and neglect, without which the goods would have been safe, he is not excused.
4. A carrier is liable for injury to goods caused by inevitable accident, or what is termed the act of God, if by his culpable negligence or unexcused and unreasonable delay in the transportation, he unnecessarily exposes the goods to the peril.

(Before WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, February 18th; decided, November 26th, 1859.

THIS action was tried before BOSWORTH, Ch. J., and a jury, on the 21st day of October, 1858, and was brought to argument pursuant to an order then made that the exceptions taken on the trial be heard in the first instance at the General Term.

The action is brought against the defendant as the proprietor of, or person doing business under the name and style of "Spaulding's Express Freight Line" to recover for the injury and damage to certain goods of the plaintiff while in course of transportation from the city of New York to Louisville, Kentucky, owing, as alleged, to the negligence of the defendant and delay in the transportation.

The answer alleged that the defendant was a forwarder only, and not a common carrier; it denied any negligence or unreasonable delay; and averred that whatever injury the goods sustained was caused by an extraordinary flood, and that all that human foresight and skill could do was done to avoid damage and guard against said flood. Without further particular statement of the pleadings it is enough to say that they were sufficient to raise the questions discussed and decided.

On the trial numerous witnesses were examined, and the case prepared for the argument at the General Term, states that:

"After the evidence was closed, the following facts were agreed upon by the counsel for the respective parties and taken down by the Court. It is admitted that the plaintiffs by their agents,

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Flagg & Baldwin, of New York, delivered to the defendants at New York, 84 cases of the goods in question on the 27th day of January, 1857, and that all the goods, excepting five cases, which were damaged, arrived in Louisville in twelve or fourteen days from the time of their delivery in New York.

"That all these goods were, when delivered to the defendant, the property of the plaintiffs, and they were partners, and that the goods were delivered to the defendant and received by him on the 27th day of January, 1857, at the city of New York, and were so delivered and received under a contract, of which the following is a copy :

"SPAULDING'S EXPRESS FREIGHT LINE,

"OFFICE IN NEW YORK, 267 BROADWAY.

Mark packages 'Spaulding's Express,'
and the route they are to go.

And ship by Harlem Rail Road,
Cor. White & Centre sts.

NEW YORK, Jan. 28, 1857.

**CONTENTS OF PACKAGES
UNKNOWN.**

No risk taken over \$200 on any single package. No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbers, or imperfectly marked.

R. A. & Co., Louisville, Ky.
Via Indianapolis. Subject to charges to New York.

**BILL OF LADING FROM NEW YORK TO
LOUISVILLE DEPOT.**

1st Class Goods 178 cts. per 100 lbs.
2d Class Goods. . . . cts. per 100 lbs.
3d Class Goods. . . . cts. per 100 lbs.
4th Class Goods. . . . cts. per 100 lbs.
New Furniture, 1½
first class rate. . . . cts. per 100 lbs.

Received from Flagg & Baldwin the following packages (contents and value unknown) in apparent good order, viz. : eighty-six cases straw goods, supposed to be marked and numbered as per margin, contents and value unknown, to be forwarded by Spaulding's Express, to the place named in the Bill of Lading, upon the following condition, to wit: that the owner or shipper hereby assumes the risk of loss or damage, by Lake or River Navigation, Fire, Leakage of all kinds of Liquids, breakage of all kinds of Glass and Glassware, or articles packed in Glass, Stoves and Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of all kinds, damage or loss of any article, the bulk of which renders it necessary to be shipped in open cars, and damage from unavoidable delays. All property shipped on this Bill of Lading will be subject to necessary co-operation, and will be delivered at the depots of the Company or Steamboat landing. It is also expressly agreed between the parties, that the said Spaulding's Express, shall not be held accountable for any damage or deficiency in packages of goods if delivered at Louisville depot in good order, and that no liability will be assumed for wrong delivery

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Chairs, boxed, double 1st class rate. . . cts. per 100 lbs.
 Carriages, boxed, 1½
 1st class rate. cts. per 100 lbs.
 Wagons, single cts. per 100 lbs.
 Pianos, owner's risk cts. per 100 lbs.
 Baskets, double first
 class rate. cts. per 100 lbs.
 Cradles, cts. per 100 lbs.
 Sleighs, boxed, 1½ 1st
 class rate. cts. per 100 lbs.
 Toys, boxed, 1½ first
 class rate cts. per 100 lbs.
 Wagon, toy, double
 first class rate . . . cts. per 100 lbs.

of goods marked by initials, or for wrong carriage of goods that are imperfectly marked. And in case of loss or damage of any of the Goods named in this Bill of Lading for which Spaulding's Express may be liable, it is agreed and understood that they shall have the benefit of any insurance effected by or for account of the owner on said goods, and in case of loss on the Lakes, the freight and charges to or at Buffalo shall be paid by the owner of said goods. In witness whereof, the Agent hath affirmed to 3 Bills of Lading, all of this tenor and date, one of which being accomplished the other to stand void.

M. B. SPAULDING, Agent. V. W.

"That the five damaged cases reached Albany on the 7th of February, 1857, and four of these were forwarded from Albany and reached Louisville on the 14th of March, then next.

"That the fifth case left Albany on 21st April, 1857, and reached Louisville on the 6th of May then next.

"That the goods in question were damaged at depot 'D.' by water, on the night of the 8th and morning of the 9th of February, 1857, to the amount, including interest, of \$681.83. Albany, by the route of the Harlem Railroad, is 160 miles from New York city, and freight cars were running on that road from New York to Albany, daily.

"That on the night and morning aforesaid, there was a heavy flood in the Hudson river, the water suddenly rising during the night and morning, some four feet higher than it had ever risen before, and that by said flood the goods were wet and damaged as aforesaid.

"That depot 'D' was constructed with its floor at such an elevation above high water mark as would not injure goods on it, by water, from any flood such as had ever before occurred at Albany.

"There was no negligence or omission of duty on the part of the defendant in not anticipating the occurrence of flood; and from the time it was apparent there would be a rise of water, the goods could not have been prevented from being wet as they were. The goods so wet and damaged were in five cases. The damages on the goods in four cases amount, exclusive of interest,

to \$178.69-100, and the damages on the fifth case, marked No. 184, amount to \$488.88-100, without interest. The fifth case, No. 184, contained 17 packages, consisting of wooden boxes, each closed up and holding goods. The case containing these 17 packages was in a rough box, having openings wide enough to insert one finger, and through which the packages could be seen. Interest may be computed from the 10th of February, 1857, on such sums as the plaintiffs are entitled to recover.

"It also appeared in evidence that the said 8th of February was on Sunday, and that the said five cases of goods were brought from the depot of the Western Railroad to the depot of the New York Central Railroad, on Saturday, the 7th, and according to the custom of business, were placed in depot 'D' to be forwarded.

"It also appeared in evidence that the average time occupied in the carriage of goods from the city of New York to Louisville, Ky., was about 15 days; and that the defendant had no interest in or control over any of the routes or railroads mentioned in said bill of lading over which said goods were transported.

"The counsel for the defendant then moved the Court to nonsuit the plaintiff upon each of the following grounds:

"1st. That from the evidence the defendant was not a common carrier, but a forwarder merely, and having well discharged his duty in that character, was not liable in this action.

"2d. That by the admitted facts in this case, the injury and damages complained of were occasioned by the act of God, to wit: the unprecedented flood, and without any negligence or want of care on the part of the defendant. And, therefore, the plaintiffs were not entitled to recover.

"3d. That it could not be concluded as matter of law from the facts in this case that the goods in question had been unreasonably delayed. And if it were otherwise, the alleged delay and detention of the goods before their arrival at Albany, had no connection with the cause of the injury, to wit: the flood, and this being the act of God and the sole cause of the injury complained of, the defendant was not liable.

"4th. That by terms of the bill of lading the liability of the defendant was restricted to that of a mere forwarder, and having

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discharged his duty as such, and the injury having accrued without his fault, he cannot be made liable in this action.

"5th. That upon the whole case, the plaintiffs have not made out a cause of action.

"6th. That in any view of the case, the plaintiffs could not recover under the terms and conditions of a bill of lading a greater sum than \$200 for the damage sustained by injury to the goods in Case Five, marked No. 184.

"The Court overruled each of the above grounds, and refused to nonsuit the plaintiffs.

"To this ruling and refusal, the counsel for the defendant then and there duly excepted.

"The Court thereupon directed the jury to render a verdict in favor of the plaintiffs for \$681.83, and accordingly the jury did render then and there a verdict for that amount for the plaintiffs and against the defendant.

"To which direction the counsel for the defendant then and there duly excepted. An order was made by the Court, and duly entered, directing that the exceptions be first heard at General Term, and that in the meantime all proceedings on the part of the plaintiffs be stayed."

Some facts were testified to by the witnesses, which are noticed in the points of counsel or in the opinion of the Court, which it is not necessary here to repeat.

Gilbert M. Spier, for plaintiff.

I. The defendant was guilty of great negligence and carelessness in detaining the damaged goods twelve days before their arrival at Albany, when they should have been, with the undamaged goods, delivered to the plaintiffs at Louisville. The defendants received all the goods at the same time.

There is no excuse offered in evidence for this delay.

II. The defendant was a common carrier, and liable as such, excepting so far as his liability was limited by the contract between the parties. A common carrier need not have any interest in, or control over, the means or route of transportation. (*Dorr v. New Jersey Steam Navigation Co.*, 1 Kern., 485; *Moore v. Evans*, 14 Barb., 524; *Fairchild v. Slocum*, 19 Wend., 329; *McArthur & Hurlbert v. Sears*, 21 id., 190.)

The true meaning of the phrase, "the act of God," is very clearly stated in 1 Smith's Leading Cases, 270.

III. The defendant is clearly liable, from the facts disclosed, as bailee. Every bailee is responsible for loss, even by accident or force, however inevitable or irresistible, if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable. (2 Kent Com., 597; 1 Cow. Tr., 60; *Teall v. Sears*, 9 Barb., 317; *Scovill v. Griffith*, 2 Kern., 509.)

IV. The clause in the bill of lading, that "no risk would be taken over \$200 on any single package," should not prevent the plaintiffs from recovering the amount of damages suffered on the seventeen packages inclosed in the rough open box.

These seventeen packages were as distinctly visible as if they had been thrown together in a pile. They were inclosed merely for the convenience of transportation. There was no fraud, as in the case of *Batson v. Donovan*. (4 Barn. & Ald., 21.)

The object or intention was to guard against liability upon small packages of goods of great value; and to diminish the risk of insurance without a corresponding compensation for transportation. The bill shows that the defendant received 178 cents for every one hundred pounds: this sum was written in the printed form. He received pay, therefore, for seventeen packages, and not for one package only. Besides, the popular and ordinary meaning of package is not a rough open box or case, inclosing packages.

This clause is not to be regarded as stipulating for willful misconduct, negligence, or want of ordinary care. The foundation of the contract, or undertaking, between the parties, rests upon a legal implication that the bailee shall be responsible for these. (*New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S., 344; Story on Bailment, § 570; *Camden Co. v. Burke*, 13 Wend., 628; *Lyon v. Mells*, 5 East., 428.)

John H. Reynolds, for defendant.

I. The defendant was not a common carrier, but was a mere forwarder, and can be made liable, if at all, only in that character, and by the rules applicable to that relation. He was an expressman, or forwarder of goods, by the conveyances of others. (*Hersfield v. Adams*, 19 Barb., 577; *Blossom v. Griffin*, 3 Kern., 569.)

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1. It appears that the defendant had no interest in, or control over, any of the railroads over which the goods were transported. This gave him the character, and imposes the liability, of a forwarder merely.

2. By the very terms of the contract, he was a mere forwarder as to the goods in question. They were received "to be *forwarded*" by Spaulding to the place named in the bill of lading," to wit, to "R. A. & Co., Louisville, Ky., *via* Indianapolis."

3. The goods were delivered by the plaintiffs' agent to the Harlem Railroad Company, and receipts taken, which were surrendered at the Express office, and the bill of lading taken. This method of doing business indicates that it was well understood by the plaintiff's agent that the defendant, in the transportation of the goods, assumed the obligations of a mere forwarder.

4. The defendant, therefore, was only responsible for diligence and good faith, and the plaintiffs had the *onus* to show some want of care on the part of the defendant.

5. There was no proof of negligence. The goods were delivered to the Harlem railroad, which was a proper conveyance of the goods in question to their destination.

6. It does not appear when the goods were loaded into the Harlem cars, nor is it shown why they failed to reach Albany until the 7th of February. Whatever may have been the cause, it furnishes no ground of complaint against the defendant.

7. There is nothing in the case from which, as a matter of law, it can be determined that the goods were unreasonably delayed. It is apparent that the entire injury arose from the flood at Albany, and for this the defendant is not liable, whether he was a forwarder or a carrier.

8. While the average time of transportation between New York and Louisville was about fifteen days, it depended upon weather, season of the year, quantities shipped, &c.; and sometimes the passage required thirty days. In the present case there was no agreement to deliver in any certain time, and hence the shipment was made subject to all the contingencies incident to the mode of conveyance, the season of the year, and the various circumstances attending the transportation of property; and to found a claim against the defendant upon any ground of delay, the plaintiffs must have given proof to show a delay arising from negligence

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9. And if the defendant is liable only as a forwarder, he is not liable whether the injury at Albany was the result of carelessness or of inevitable accident.

II. The injury to the goods was the result of inevitable accident, and the defendant is not liable in any capacity.

1. It is impossible to imagine a case of an injury by the act of God or inevitable accident, if this be not one.

2. It was the result of the action of the elements, beyond human control. It was, in no proper sense, occasioned by the act of man, but in opposition to it, and it was an injury arising from a cause against which human foresight and sagacity could not guard. (Redfield on Railways, 232, 233; *Forward v. Pittard*, 1 Term R., 27; *McArthur v. Sears*, 21 Wend., 192; *Williams v. Grant*, 1 Conn. R., 487; *Smyrl v. Nolon*, 2 Bailey, 421; *Faulkner v. Wright*, 1 Rice, 108; *Bowman v. Tball*, 23 Wend., 306; *Parsons v. Hardy*, 14 id., 215; *Harris v. Rand*, 4 N. H. R., 259; *Crosby v. Fitch*, 12 Conn. R., 410; *Morrison v. Davis*, 20 Penn. R., 175; 1 Parsons on Contracts, §§ 635-637.)

3. In the present instance the flood was sudden, and the water was four feet higher than ever before known. It was a result contrary to all human experience, and there was no negligence in not anticipating or guarding against it. The warehouse in which the goods were deposited was sufficient, in all respects, to protect the goods from injury by water against any flood then before known.

4. There was, therefore, no negligence on the part of the carrier or forwarder, by which the goods were unnecessarily exposed to injury.

5. There can be no recovery on the ground of delay between New York and Albany, where the goods were overtaken by the flood. The delay was not the proximate cause of the peril. (*Morrison v. Davis*, 20 Penn. R., 175.)

6. The delay in forwarding the injured packages after their injury is not shown to have subjected the plaintiffs to any special damage, or the goods to greater injury, and it cannot be inferred as a matter of law. The damage was occasioned solely by the water. If the goods were made worse by delay in sending them on, it was a matter of proof, and the plaintiffs gave no proof on the subject.

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7. By the contract, no damage beyond \$200 can be recovered upon the package No. 184.

It is submitted that, upon the facts of the case, the plaintiffs were not entitled to recover, and a new trial should be granted.

BY THE COURT—WOODRUFF, J. It was admitted on the trial of this action that the goods in question were delivered by the plaintiffs and received by the defendant at the city of New York, under the contract set forth in the case and called a bill of lading.

By that instrument, the defendant declares that he received the goods to be forwarded to the place named in the bill of lading, Louisville; and that all property shipped on that bill of lading will be delivered at the depots of the Company or steamboat landing; and in providing against liability for deficiency in packages, it is agreed that no such liability shall exist if the goods "are delivered at Louisville depot in good order;" and the stipulation in respect to amount of freight plainly embraces the compensation to be made to the defendant for the entire transportation from New York to Louisville.

The admission on the trial that the defendant received the goods in connection with this contract, imports that the expression, "Spaulding's Express Freight Line" and "Spaulding's Express," mean the defendant, M. B. Spaulding.

I. Upon these facts we have no hesitation in saying that the defendant undertook to carry the goods, and was not a mere forwarder whose duty consisted only in receiving and delivering the goods to others to be carried.

The observations made in *The Mercantile Insurance Company v. Chase*, (1 E. D. Smith, 121,) where goods were delivered and received under a contract in terms very similar to that before us, are apt to express our views of the present case on this point; and *Wilcox v. Parmelee*, (3 Sandf. S. C. R., 610,) is to the like effect. The use of the term "forward" in the contract is controlled by the nature and extent of the actual undertaking, and did not make the defendant a forwarder in the technical sense of that word. An agreement "to forward from New York to Louisville" embraced carriage. It became the duty of the defendant to deliver the goods at Louisville. Whether the defendant used the term "carry," or "transport," or "forward,"

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the goods from New York to Louisville is wholly immaterial, so long as he undertook the reception of the goods here and their delivery there. His duty embraced everything necessary to be done to accomplish a delivery of the goods at the place designated, and the compensation stipulated for in the contract was an expressed equivalent for the whole service. Whether the defendant used his own means of transportation in the service to be performed, or made his own private arrangement with others to perform the actual transportation, did not affect his relation to the owners of the goods with whom he had agreed to receive and deliver them. The fact proved, viz.: "that the defendant had no interest in or control over any of the routes or railroads mentioned in the said bill of lading, over which said goods were transported," does not therefore affect the relation of the defendant to the plaintiff in this respect, since the defendant assumed to deliver, and it thereby became his duty to provide the means; and because, also, the bill of lading did not, expressly or by implication, specify any such routes or railroads otherwise than simply to say that the goods should be carried "*via Indianapolis.*"

Again, the provision that in case of loss from any cause for which Spaulding's Express should be liable, they shall have the benefit of any insurance thereon, and in case of loss on the lakes, the freight and charges to or at Buffalo shall be paid by the owner, plainly shows that the defendant's own understanding of the contract contemplated liability for loss in the course of transportation, which is obviously inconsistent with the claim now made that his duty was performed and his liability terminated by a mere delivery to others to be carried.

The only case in which a contrary doctrine has been held, is *Hersfield et al. v. Adams et al.*, (19 Barb., 577, N. Y. Special Term,) and there the decision is mainly placed on the ground that the defendants were, by special contract, relieved from liability for the cause of loss there proved. So far as it declares that the defendants were not common carriers, the foregoing reasons forbid our concurrence therein.

II. The next and only other question urged upon our attention by the counsel for the defendant, is whether the injury to the goods happened under circumstances or from causes for which the defendant is responsible.

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Unreasonable and unexcused delay in the transportation, and actual injury resulting therefrom, are the grounds upon which it is sought to charge the defendant.

By the agreement of the parties made on the trial, it is conceded that the actual injury arose from the goods being wet in the railroad depot at Albany; that the goods were, when wet, upon a floor in the depot at such an elevation above high water mark that goods thereon would not be injured by any flood such as had ever before occurred in the Hudson river at Albany; that the flood by which they were in fact injured, was a sudden rise in the water of the river, during the night, some four feet higher than it had ever risen before; that there was no negligence or omission of duty on the part of the defendant in not anticipating the occurrence of the flood; and that from the time it was apparent that there would be a rise of water, the goods could not have been prevented from being wet as they were.

Under this admission it is clear that if the defendant was without fault in exposing the goods to the action of the flood, he is not liable for the injury arising therefrom. If, in the due discharge of his duty, he had the goods in the regular and usual course of transportation, so that their being in the depot at the time was proper, then injury by the action of an extraordinary flood, rising higher than any flood had ever risen before, which it was no negligence or breach of duty not to anticipate, and from which, when the rise of water became apparent, the goods could not be delivered, is an injury by the act of God in such sense that the carrier is excused.

But the defendant had violated his duty and broken his contract, and was under the actual pressure of fault and neglect, without which the goods would have been safe.

The goods, in all consisting of eighty-six cases, were delivered to the defendant on the 27th day of January, 1857, to be carried and delivered to the plaintiff at Louisville. Eighty-one of these cases were carried and delivered within twelve or fourteen days after they were received in New York; that is to say, they reached Louisville on the 8th or 10th of February.

It was the duty of the defendant to deliver all the goods within a reasonable time, and according to the usual course of business over the route by which they were to be transported. There is

nothing in the case to indicate that the eighty-one cases which were so delivered were forwarded with any extraordinary or unusual speed, but the proof is that from ten to fifteen days is the usual time of conveyance. The presumption is, therefore, that if the defendant had performed his duty the five cases, which are the subject of controversy, would have reached Louisville at or about the same time with the others.

But these five cases were brought from the depot of the Western Railroad to the depot of the Central Railroad, at Albany, on Saturday, the 7th of February, when, as before suggested, they ought to have been at or near their destination, Louisville, Kentucky. Whether this delay arose from the detention of the goods in New York, or at the depot of the Western Railroad, or at any intermediate point, is not stated. Nor is any explanation of the cause of delay given or attempted; while it is agreed that freight cars run daily from New York to Albany on the road by which these goods were to leave New York. If any explanation of this delay could be given, it was the duty of the defendant to give it. Enough was shown to cast the burden of proof upon him. He had undertaken to carry, and the delay was, *prima facie*, not only unreasonable, but apparently the result of gross negligence and want of attention, either in not beginning the carriage in due time or in delaying the progress of the goods after the transportation was begun. It is not for the defendant to require that the plaintiffs should show the cause of the delay.

The result is, that the defendant was grossly negligent in the performance of his duty; this delay was a breach of his contract to carry and deliver within a reasonable time; and while so in fault, the goods in his charge were, in the night of Sunday, the 8th, or on the morning of the 9th of February, reached and injured by the extraordinary flood already mentioned.

But the defendant insists that, if the defendant was in fault in respect of the delay which had occurred, he is, nevertheless, not liable for the damage complained of; that, in such case, though the carrier be liable for delay, he is only liable for the immediate consequences of delay: by which he is understood to claim that he is liable only for such damages as the plaintiffs sustained irrespective of the injury to the goods by being wet in the flood at Albany; and, therefore, his damages are to be ascertained by

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assuming, for the purposes of the assessment, that the goods arrived safely, though not until long after the time when they should have been delivered.

This claim rests upon the ground that the delay was not the proximate cause of the injury. "*Causa proxima non remota spectatur.*"

The delay certainly did not cause the flood. But we think that the defendant cannot find protection in this view of his responsibility. His unexcused neglect of duty did expose the goods to the peril; and when the defendant was found in actual fault, he lost the protection from liability by inevitable accident which the law extends to the carrier in the due performance of his undertaking. From the moment his faulty negligence began, he became an insurer against the consequences which might result therefrom, whether ordinary or extraordinary.

It is true that, in *Morrison v. Davis*, (20 Penn. R., 171,) where goods carried in a canal boat were injured by the wrecking of the boat caused by an extraordinary flood, it was held that the carriers were not rendered liable merely by the fact that, when the boat was started on its voyage, one of the horses attached to it was lame, and that, in consequence thereof, such delay occurred as prevented the boat from passing the place where the accident happened, beyond which place it would have been safe. In considering the question, the Court likened the carrier to an insurer against loss by perils of the seas, who are said to be not liable for a loss immediately arising from another cause, although, by perils of the sea, the ship had sustained an injury without which the loss would not have taken place.

Possibly a question might be suggested whether, in that case, the mere fact that one of the horses was lame was enough to charge the defendants; but it must be conceded that, in the view taken by the Court, the case is strikingly like the present. We are, nevertheless, constrained to say, that, in so far as the principle of the decision tends to exonerate the present defendant, we cannot give it our assent.

A common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself: his act or neglect must not concur and con-

tribute to the injury. If he departs from the line of duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused damage, he is not protected.

The defendant was bound to deliver the goods in a sound condition. If prevented by the act of God, he is excused; but if his own misconduct contributed to the injury by exposing the goods needlessly or improperly to the peril, his excuse fails. All ordinary perils from even the act of God he was, even while engaged in the faithful performance of his duty, bound to foresee and guard against by the exercise of a care and diligence proportioned to the danger. He was not bound to anticipate and guard against extraordinary perils which human foresight would not anticipate; but it was his duty to do nothing which should expose the goods to any perils which would not arise in the proper and diligent prosecution of the journey which he had undertaken. And if he, by needless delay, subjected the goods to damage, from whatever cause concurring or coöperating therein, he is liable.

This we believe to be in accordance with sound policy, just in its operation, and sustained by the weight of authority.

Thus, if a carrier by water deviates from his voyage and the ship and goods are lost, he is liable, although the loss was by a peril of the sea. He is not at liberty improperly to encounter mischief, even from such a cause. In principle, it can make no difference whether his deviation is intentional or negligent; it is sufficient that he is in fault, and that subjects him to liability.

So, where a carrier by land deviated from the direct and principal route, and the goods were lost by a cause which might, had he been without fault, have excused him on the score of inevitable accident, he was held liable because the loss happened in consequence of his own improper conduct: he had no right so to deviate.

The observations of TINDAL, Ch. J., in *Davis v. Garrett*, (6 Bing., 716,) apply with much force to the present case. There the carrier had deviated from his voyage, and a loss occurred by a peril of the sea. He says: "No wrongdoer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an

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answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."

In *Williams v. Grant*, (1 Conn. R., 492,) the true rule is stated as we think, and it covers the present case; after stating the exemption of carriers from liability for losses caused by inevitable accident, GOULD, J., says: "It is, however, a condition precedent to this exoneration that they should have been in no default; or, in other words, that the goods should not have been exposed to the peril or accident which occasioned the loss by their own misconduct, neglect or ignorance. For, though the immediate or proximate cause of a loss, in any given instance, may have been what is termed the act of God, yet, if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused." (See also 12 Conn. R., 410; 4 Whart., 204; Harp. [S. C.] R., 262, 468; *Wilcox v. Parmelee*, 3 Sand., 610.)

The defendant is, we think, liable, and the plaintiffs were entitled to recover.

A point was suggested on the hearing of the exceptions, though not argued by the counsel, relating to the amount of the damages. An entry on the margin of the contract, called the bill of lading, was in these words: "No risk taken over \$200 on any single package." One of the five cases which were injured contained seventeen packages, and the damage to the whole seventeen packages amounted to \$438.88. It is claimed that no more than \$200 should be allowed for the injury to the whole seventeen packages.

It is obvious that, according to the very terms of the memorandum, \$200 being allowed on any single package, that sum might, within the provisions of the contract, be allowed on each of the seventeen packages, unless the word "package" is used in a different sense in the statement of the facts agreed upon by counsel, from its meaning in the contract, which forms a part of that statement. This we cannot say.

Again, the packages thus forming one case were inclosed in a rough box, having openings through which the packages could

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be seen. The defendant, therefore, knew when he was receiving the case that he was receiving several packages, though inclosed. It does not seem to us that securing several small packages in this manner, so that they were more conveniently carried, when the carrier knew, or might, by ordinary inspection, have known that he had received, not one single package, but seventeen small packages, should render the liability of the defendant any less than it would be if the seventeen packages had been separately delivered.

And, finally, on this point we incline to the opinion that the term risk, in the memorandum in question, has reference to perils which occur without the actual fault of the defendant, and do not exempt him from liability for losses resulting from his actual negligence.

The plaintiff should have judgment on the verdict.

Ordered accordingly.

PLATT ADAMS, Plaintiff and Respondent, v. SIMEON LEELAND et al., Defendants and Appellants.

1. Where the evidence as to the diligence of a Notary to find the makers of a note in order to demand its payment at maturity from them personally, is free from conflict, the question of its sufficiency to establish due diligence in that behalf is one of law.
2. The evidence given on the trial of this action, to establish due diligence, stated, considered and held sufficient to make a *prima facie* case of due diligence.
3. Statements made to the Notary by persons to whom he was referred at the makers' last known place of business, as having knowledge of the makers, in answer to questions as to where the makers resided or could be found, held competent upon the question of the Notary's diligence to find the makers.

(Before HOFFMAN and WOODRUFF, J. J.)

Heard, November 7th; decided, November 26th, 1859.

THIS is an appeal by Simeon, Charles and Warren Leland, the defendants, from a judgment in favor of Platt Adams, the plaintiff, rendered on a trial had before Chief Justice BOSWORTH and a jury, on the 23d of May. 1859.

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The suit is against the defendants as indorsers of a note dated "New York, February 12, 1857," for \$6,000, payable on the 20th of June then next, without grace, to the order of James Moore, indorsed by him to P. C. Ward, by the latter to the defendants, and by the defendants indorsed in blank and delivered to John Thompson, and assigned by the latter to the plaintiff in August, 1857, under a general assignment by Thompson of his property.

The note is made by Seymour, Moore & Co., a firm doing business, at the time it was made, at 110 Broadway, New York city.

The principal questions related to the sufficiency of the demand of payment, and to evidence bearing on those questions. The facts are stated in the opinion of the Court.

A verdict was ordered for the plaintiff for \$4,379.87, the balance due on the note, and from the judgment entered on the verdict, this appeal is taken.

S. B. Oushing, for appellants,

Insisted that as there was no conflict of evidence as to the diligence of the Notary, its sufficiency was a question of law, and that the evidence was insufficient to prove due diligence, or excuse the necessity of making a personal demand of the makers, or a demand at their residence, whether it was in this State or out of it, or at their place of business, and cited and commented on 6 Metc., 290, and *Taylor v. Snyder*, 3 Denio, 149; Chitty on Bills, 12 Am. ed., 395, 353; 7 Barb., 143; 14 Johns. R., 114; 16 Pick., 392, and 5 Hill, 232.

E. More, for respondent,

Contended that as Seymour occurred in the name of both firms, and Seymour, Morton & Co. were represented to be successors of the makers, payment was in fact demanded at the place of business of one or more of the makers.

That if this position was untenable, then the only question was, whether due diligence had been used, and that *Taylor v. Snyder*, (3 Denio, 152,) warranted the decision made at the trial.

BY THE COURT—HOFFMAN J. The action is brought upon a note dated the 12th of February, 1857, for \$6,000 drawn by

Seymour, Moore & Co., in favor of James Moore or order, payable on the 20th of June ensuing, without grace, with interest at the rate of seven per cent.

The payee, James Moore, and one P. C. Ward, and the defendants by their firm name of Simeon Leland & Co., indorsed the note, and it was delivered to John Thompson, by whom it was assigned and delivered to the plaintiff.

The chief question is, as to the sufficiency of the demand for payment upon the makers.

The note is dated at New York. The Notary deposes, that the note was given to him for protest by Thompson. "He (Thompson) told me their office (the makers') was at 110 Broadway. I called at the place designated, and found '*Seymour, Morton & Co.*,' over the door, and presented the note; payment was demanded and refused. I was informed there that I might find their agent at 54 William street, and I presented to him, the man in William street."

It was also proved (by John Thompson) that Seymour, Moore & Co. had dissolved before the note matured. The last the witness knew of Seymour, Moore & Co., they were at 110 Broadway. The Notary further testified thus: "I inquired at No. 110 Broadway over the Metropolitan Bank, for Seymour Moore & Co. The person in attendance there told me that that had been their office; he said I might find somebody who knew more about it at 54 William street; he gave me the name of a man, a Mr. Lincoln, at 54 William street, that he said sometimes acted as their Agent. I understood from the man at 110 Broadway, that they (Seymour, Morton & Co.) were the successors of Seymour, Moore & Co. The defendants excepted to the evidence as to what was said in answer to the inquiries made by the Notary at 110 Broadway. The Notary further testified, that the man at 110 Broadway declined paying the note, saying he had no money. The Notary also inquired at the office adjoining 110 Broadway and was there told that Seymour, Moore & Co. had dissolved.

Demand of payment was then made of Lincoln, at 54 William street. He refused payment. He was asked by the Notary if he knew where the makers were. He answered that he supposed they were out West. "He professed to know a little about it, but refused to tell me (the Notary) much about it. He told me

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the old firm was dissolved." The statements of Lincoln were objected to, the objection was overruled, and the defendants excepted.

The Notary went to the last place of business of the drawers. He is sent to another place, where he is told some information might be obtained. He would not have done his duty if he had not gone there. He is there told that the drawers were supposed to be out West. The statements thus admitted in evidence were admissible, not as proof of the facts stated, but upon the question of the Notary's diligence, to show that he availed himself of information as to where the parties might be found. I think that there was sufficient diligence used in ascertaining the place where the demand should be made, and such demand was sufficient. (*Taylor v. Snyder*, 3 Denio, 152; *Edwards on Bills, &c.*, p. 484; 9 Wheat. R., 598.) There was enough to put the defendants upon proof of the makers being where they could be reached.

The exceptions to the ruling of the learned Judge in admitting the statements of the persons at 110 Broadway, and 54 William street, are disposed of by the above remarks.

The judgment should be affirmed, with costs.

Judgment affirmed.

MICHAEL L. LEMAN, Plaintiff and Respondent, v. THE MAYOR, ALDERMEN, &c., OF THE CITY OF NEW YORK, Appellants.

1. The Mayor, Aldermen and Commonalty of the city of New York, since the passage of the act entitled "An act to make permanent the grades of the streets and avenues of the city of New York," passed March 4, 1852, cannot, even under the authority of an ordinance passed by both branches of the Common Council and approved by the Mayor, change the grade of any street in said city, established by law when said act was passed, south of Sixty-third street, without becoming liable to the owner of any lot or building on the street so altered, for all damages caused to him, as such owner, by reason of the making of such change of grade; unless such change is made upon the written consent of the owners of at least two-thirds of

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the land in lineal feet fronting on each side of the street opposite to and adjoining that part thereof, the grade of which is to be changed or altered.

2. By the terms of that act it is declared that it shall not be lawful for the Common Council of the city of New York to change such established grade, without such consent; if therefore they make such change and the defendants by their agents proceed to carry it into actual execution to the injury of the owners of lots on the street, the city is liable for the damage sustained.

(Before *HOFFMAN* and *WOODRUFF*, J. J.)

Heard, November 7th; decided, November, 27th, 1859.

THIS is an appeal by The Mayor, Aldermen and Commonalty of the City of New York, the defendants, from a judgment in favor of Michael L. Leman, the plaintiff, rendered on the report of Hon. John L. Mason, as Referee.

The plaintiff is the owner of a lot on Pearl street, New York city, and the building thereon, fronting on Pearl street, and was at the time the acts hereinafter stated were done.

In April, 1857, the defendants, by an ordinance which passed both branches of the Common Council and was approved by the Mayor, directed the grades of Pearl and other named streets to be changed; that the work be done at the expense of the defendants; and appointed three assessors to make a just and equitable assessment of the expense among the owners of lots to be benefited thereby, in proportion as nearly as may be to the advantages which each may be deemed to acquire.

The defendants made such change of grade without the plaintiff's consent, and without the consent of the owners of two-thirds of the land in lineal feet, fronting on and adjacent to such change of grade as required by the act of the Legislature, entitled "An act to make permanent the grades of the streets and avenues of the city of New York, passed March 4th, 1852."

In making such change of grade, the street was dug down three or four feet below the original grade in front of the plaintiff's premises; and such change of grade was injurious to the plaintiff; and made expenditures by him necessary, to adapt the house and lot to the new grade; whereby the plaintiff sustained damage to the amount of \$826.57.

The Referee held the defendants liable, and decided that the plaintiff recover from them the damages aforesaid. From the judgment entered on that decision the present appeal is taken.

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Moses Ely, for appellants.

I. Plaintiff has no right of action of trespass against the defendants, for the acts he complains of.

Until the law of 1852 the city might "alter and amend" their streets at pleasure. (See all the laws upon this subject, to wit: 1st. Montgomerie Charter, § 16, Davies' Laws, p. 177; 2d. Rev. Laws of 1813, § 175, id., p. 526; 3d. Law of March 4, 1852, id., p. 1083.) The right to "alter and amend" involves the right to change the grade of a street. (*Waddell v. The Mayor, &c.*, 8 Barb. S. C. R., 95, and cases there cited.) The law of 1852 does not take from the city the right to make the change of grade, where a change is to be made. It only imposes restraints upon its exercise. Before this law, the exercise of the right was unrestrained. No one had any remedy or redress for loss he might sustain by reason of it. No damages could be assessed, and none could be allowed to him. It follows that the remedy given by the last named statute is a "new remedy," and the assessors, by whom the damages are to be awarded, are, for the purposes of such award, a new tribunal. The consent of property owners to the change is made necessary by the language, "it shall not be lawful," &c., without such consent. This annexes to the law of 1852 a right of action on the part of the People for its violation. (2 R. S., part 4, ch. 1, title 7, p. 696.) "Where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, in such case, the party violating the statute is liable for the penalty only." (Sedgwick on Stat. and Const. Law, p. 401.) Again, (p. 402,) "where, by a statute, a new right is given and a specific remedy provided, or a new power, and also the means of exercising it, are provided by statute, the power can be exercised, and the right vindicated, in no other way than that prescribed by the statute." By the statute of 1852: 1st. A penalty was made to attend its violation. Its violation was a misdemeanor. 2d. No new right was given the individual. 3d. A specific remedy is provided.

II. The restraints imposed by the statute of 1852 were mere reservations of rights to the public, and not a bestowal upon individuals. These restraints were mere police regulations. It was left to the chances of each particular case, as to whose will their exercise should depend on. The consent was not a condition

precedent to the invasion of private property, but to the exercise of a public duty.

III. It does not follow that a valid award, under the statute, could not be made, because an assessment for benefits would be void. The argument that this does follow is founded upon the supposition that the awards are to be paid out of the particular fund to be raised by the assessment, which is erroneous. The assessment is but a means of reimbursing the city the moneys expended in payment of the awards. The test is whether the person, to whom an award should be made, would have a lien upon the particular fund derived from the assessment for the payment of the award, in case of refusal of payment by the city, for any cause.

IV. In this case the plaintiff is entitled to no private remedy. He has suffered no private wrong. 1st. (As already shown,) the right infringed was not a private right. 2d. The injury suffered was common to all plaintiff's neighbors in Frankfort, Hague, Pearl, Vandewater, and other streets in his vicinity. (*Lansing v. Smith*, 8 Cow., 146; *Smith v. Lockwood*, 13 Barb., 209.)

The judgment should be reversed.

A. J. Willard, for respondent.

I. The power which had been conferred upon the Mayor, Aldermen and Commonalty of the city of New York, by previous laws or charters, to regulate the public streets, was limited by the act of the Legislature, passed in 1852. (Sess. Laws, 1852, p. 46, § 2.)

The second section of this act provides that "it shall not be lawful for the Common Council to alter or change in whole or in part the grade of any street or avenue in said city now established, south of Sixty-third street, or which may hereafter be established north of Sixty-second street, except upon the written consent of the owners of at least two-thirds of the land in lineal feet, fronting on each side of street or avenue opposite to and adjoining that part thereof, the grade of which is to be changed or altered."

This limitation of the power of the Corporation required, as a preliminary to any action, that they should obtain the written consent of the owners of at least two-thirds of the lineal feet

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fronting on and adjacent to any street, of which it was proposed to change the grade.

Without such consent, there was no authority in the Corporation to cause the existing grade of any of the established streets of the city to be altered, and if, without obtaining such consent, they changed the grade, their act was one of trespass, for which an action would lie by a party injured.

The power of the Corporation over the streets of the city is a mere political power. The public easement in the streets is vested in the People of the State, and not in the citizens of New York, or the corporation of New York. As, in the counties generally, the care and custody of highways is committed to commissioners or overseers, so the same duty is enjoined in cities upon the corporate authorities, and their respective common councils are made commissioners of highways, and the corporation is rendered liable for all damages occasioned by the negligent discharge of their duties. (*Storrs v. City of Utica*, 17 N. Y. R., 104.)

As commissioners of highways, in either towns or cities, all their powers and duties are conferred and prescribed by statute, and it is competent for the Legislature to enlarge or restrict them, or to take them away altogether.

The evidence in this case establishes that the appellants, without having obtained the consent of the owners of the requisite number of lineal feet, passed an ordinance and altered the grade of an established street, to the permanent injury of the respondent's property. This, under the prohibition of the act of 1852, was an unauthorized act, and constituted it a trespass.

If the act here complained of had been done under lawful authority, and all the requirements of the statute conferring the authority been strictly observed, then, except for the indemnity provided by the act of 1852, it would probably have been regarded as *damnum absque injuria*. And, it is submitted, that it was to relax the harsh rule of the common law, as stated in *Radcliff's Executors v. Mayor of Brooklyn*, (4 Comst., 195,) that the Legislature enacted the remedial statute of 1852.

In the absence of all evidence to the contrary, the respondent owning the premises abutting upon the street, is presumptively the owner of the fee of the street to the centre, subject to the

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public easement; and hence, if the act of subverting the soil for the purpose of lowering the grade of the street was without lawful authority, the respondent could have his action as well for the trespass to the freehold, as for the consequential injury to his adjacent property. For if the entry upon the street was without right, it rendered the trespasser liable for all the consequences of his illegal act.

The right to recover under such circumstances is founded in principle and sustained by authority. (*Howell v. City of Buffalo*, 15 N. Y. R., 512; *Conrad v. Trustees of Ithaca*, 16 id., 158; *Mott v. The Mayor, &c., of New York*, MS. Opinion, Common Pleas.)

BY THE COURT—HOFFMAN, J. The constitutionality of the act of 1852, (March 4, Davies' Laws, p. 1083,) has not been questioned, and is to be assumed until clearly disproved. It is, then, a restriction upon a previous legal and absolute right to change the grade of streets, as the Common Council might be advised.

The 2d section of that act provides that "it shall not be lawful for the Common Council to alter or change, in whole or in part, the grade of any street or avenue in the said city now established, south of Sixty-third street, or which may hereafter be established north of Sixty-second street, except upon the written consent of the owners of at least two-thirds of the land in lineal feet fronting on each side of the street or avenue opposite to and adjoining that part thereof, the grade of which is to be changed or altered."

By the 3d section of this act, where the grade of any street or avenue shall be changed or altered, in whole or in part, "it shall be the duty of the assessors appointed to estimate and assess the expense of conforming to such change of grade and regulating the street or avenue in accordance therewith, to estimate the loss and damage which each owner of land fronting on such street or avenue will sustain by reason of such change, to such lands or to any improvements thereon; and make a just and equitable award of the amount of such loss or damage to the owner or owners of such lands or tenements fronting on such street or avenue, and opposite thereto, and affected by such change of grade; and the amount of such award shall be included in the expense of such proceeding, and with such expense shall be assessed as provided in the 175th section of the act of April 9, 1813, entitled,

Leman v. The Mayor, &c., of the City of New York.

'An act to reduce several laws relating particularly to the city of New York into one act.'

This statute has thus provided a Board, not only for assessing adjoining owners for the benefit they may derive from the improvement, but also for ascertaining the damage which may be sustained by adjoining owners. It may well be that, if the plaintiff, or any one similarly situated, had gone before such assessors, proved his damage, and submitted his claim, he might be estopped from urging the present objection. But the Corporation has, in this instance, assumed the performance of the work; resolved that it shall be done at their own expense, and assessors were appointed only to assess upon the owners benefited their respective proportion of the expense. I presume this was done under the 270th section of the act of 1813. (2 R. L., 446.)

The Common Council could only perform the work in question upon obtaining the consent of two-thirds of the owners, as prescribed in the act of 1852. They have done it in an unlawful manner, and damage has been suffered by the plaintiff from this unauthorized act. The case appears to be a clear one. *Howell v. The City of Buffalo*, (15 N. Y., 512,) appears to govern it.

In *The Philadelphia and Wilmington Railroad Company v. Quigley*, (21 How. U. S. R., 202,) the Court say: "The powers of the Corporation are placed in the hands of a governing body selected by the members, who manage its affairs and who appoint the agents for the accomplishment of the objects of its being. But these agents may infringe the rights of persons who are unconnected with the Corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is a recognition of a corporate responsibility for the acts of those representatives."

The result of the cases is, that, for acts done by the agent of a corporation, either *ex contractu* or *ex delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible, under similar circumstances.

The action was one of libel. I may observe that the trespass and damage here complained of are the acts of immediate agents of the Corporation, who acted under its direct authorization.

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It is objected that thus the title of a multitude of owners must be searched before an improvement of this nature can be made. So it must be upon opening streets; and the act of 1852 has provided for the difficulty, where the owners to be paid are not designated in the report of the assessors.

The judgment should be affirmed, with costs
Judgment affirmed.

JAMES W. WILTSIE v. WILLIAM L. NORTHAM.

1. Where, by an agreement between L. & A., of the one part, and the defendant N., of the other, the former sell their fixtures, &c., in a coal-yard occupied by them, for a specific sum, and take N.'s negotiable note, and also sell to N., for other consideration, a lease of said yard, and guarantee its renewal on certain terms, and agree, if a renewal be not procured, "to refund the one-half the loss on such fixtures," and no renewal can be procured, and a suit is brought on such note by one who is an indorsee of it after its maturity, and there is no fraud in procuring the note or in the transaction on which it is founded, the most that the defendant can have deducted from the recovery on the note is one-half of the difference between the value of such fixtures for the purposes of use under a renewed lease and the value thereof for the purpose of removal.
2. The plaintiff shows a sufficient title to the note to maintain an action on it, although he bought it by giving his own note for it, and, before the second trial of the action, took up his own note by assigning a judgment recovered in the action itself on a former trial of it, (which judgment was reversed and a new trial ordered,) and notwithstanding his vendors of the note and his assignees of such judgment are the persons to whom the note was originally given.

(Before HOFFMAN, PIERREPONT, and MONCRIEF, J. J.)

Heard, October 31; decided, November 26, 1859.

THIS action comes before the Court upon questions of law arising at the trial, and there ordered to be first heard at General Term. It was tried before Mr. Justice HOFFMAN and a jury, on the 24th of November, 1858.

The complaint is upon a note, dated November 16, 1855, made by the defendant, for \$1,648.28, payable twelve months after its

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date, to the order of P. H. Lalouette, by him indorsed to Lalouette & Ashfield, and alleged to have been indorsed by them to the plaintiff, who is averred to be the lawful owner and holder of it.

The answer denies the indorsement to the plaintiff, or that he is the lawful owner and holder, and states, as a defense, that, in November, 1855, Lalouette & Ashfield sold to him their "stock, fixtures and lease of a certain coal-yard;" that the agreement was in writing, and a copy of it, dated November 16, 1855, is set forth, which states that, in consideration of the note, Lalouette & Ashfield sell to the defendant "all fixtures and appurtenances in, upon and appertaining to the coal-yard," and described in a schedule annexed to the agreement; and also, in consideration of one dollar, sell "the present lease of said yard, which has about two years to run, at its present rent, and do guarantee to him a renewal to him of said lease for five years at a yearly rent of not exceeding \$200, advance, per annum, and at as much less as can be, and also the free privilege to remove all said fixtures at its expiration. If a renewal is not given, then Lalouette and Ashfield are to refund the one-half the loss on said fixtures;" and "further, in consideration of a note" made by defendant for \$3,791.79, at six months, they sell to defendant "all the coal in said yard, being about 700 tons."

The answer states that, to induce the defendant to enter into said agreement, L. & A. represented that they held a lease which then "had two years or thereabouts to run," and that, by its terms, they "were entitled and privileged to remove all of said fixtures at the expiration of said two years;" that, relying on these representations, he entered into said agreement, and gave the note in suit, and, to secure it, executed a mortgage on real estate in Sacramento, and entered into the possession of the premises, fixtures and coal, and carried on business there until about the 1st of May, 1857, when he was obliged to quit and abandon all of said fixtures and appurtenances, excepting a horse and cart, worth about \$200.

That, after entering into possession, he discovered that L. & A. had no lease, but occupied under one A. Ashfield, who had a lease which expired April 1, 1857; that L. & A. notified him they could not procure a renewal of said lease upon the terms

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they had agreed to do, and the owner notified him that he must pay an advance of \$1,600 or quit," and "that he must not remove any of the fixtures or appurtenances;" and that defendant, on the 1st of May, 1857, "quit and surrendered the said premises and fixtures." It avers that L. & A. knew they had no lease, and that, by the lease under which they occupied, "they had no right to remove the most valuable portion of the fixtures and appurtenances, * * for which said note for \$1,600 was given," and also avers great damage to defendant "in his said business" by reason of said misrepresentations. It alleges that defendant established a business which he was obliged to abandon; that he was obliged to remove his coal at great expense, and "also to abandon all the fixtures and appurtenances belonging to said yard," to his damage to an amount beyond that of said note; that the consideration of the note has entirely failed, and that, on the 10th of June, 1856, he brought a suit in the Supreme Court against L. & A. to recover damages for the breach of said agreement and to procure said note to be canceled and delivered up; that L. & A. appeared in said action on the 24th of said June; that it is at issue and pending; that L. & A., and not the plaintiff, "are the real parties in interest in this action;" and it prays a dismissal of the complaint, and "that this defendant may have such affirmative relief in the premises as to this Court shall seem proper."

The plaintiff first called, as a witness, *Alfred Ashfield*, who testified that the firm of Lalouette & Ashfield consisted of Paul H. Lalouette and Henry Ashfield; that Henry Ashfield is his son; that the note in suit was transferred to the plaintiff about the time the defendant sued L. & A. in the Supreme Court; that in that suit it was decided that the note should not be given up, but that defendant should have judgment for \$1,127.60 damages; that the plaintiff bought the note in suit by giving his own note for it; and that the plaintiff, having recovered in this action on a former trial of it, he took up his own note by "an assignment of the judgment so recovered."

The plaintiff having rested, the defendant moved for a nonsuit, because the evidence showed that the plaintiff was not the lawful owner and holder of the note, and upon the evidence he could not recover on the cause of action stated in the complaint; which motion was overruled, and the defendant excepted.

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The defendant was then sworn in his own behalf; produced the agreement of November 16, 1855, described in his answer; and testified that the note in suit was the one named in said agreement—its amount being larger than the sum there named, by reason of the addition of interest; and also produced a lease which he said “is the lease referred to in the agreement.” That lease is dated the 3d of March, 1851; is from John Targee to Alfred Ashfield, for the term of five years from the 1st of April, 1852, at a rent of \$700 per annum, payable quarterly. It contained a covenant of the lessee not to assign or underlet without the written consent of the lessor: it contained no covenant for a renewal: it contained a covenant to surrender the premises at the end of the term in as good condition as they then were, ordinary wear and tear alone excepted; and also an agreement that the lessee or his assigns might erect an office on the premises and remove it on or before the expiration of the term. It had a written consent on it, that the lessee might underlet. The defendant further testified that he first discovered, about nine months after he went into possession, that L. & A. had no lease: on conversing with Lalouette, he said he thought there would be no difficulty in procuring a renewal; defendant told him unless he pledged himself to withdraw the note from the bank he would advertise it; that he withdrew the note. He was informed in September, 1856, the lease would not be renewed; that he left the middle of April, 1857; left “the old fixtures in the yard;” removed a horse and cart, worth about \$150; expenses of removing were about \$100; lost many of his customers, and his business was deranged; and he testified as to the value of the fixtures, if to be used as they were, and their value to be removed.

Mr. Ashfield being recalled, said he took the lease for Lalouette because the owner said he would let to him cheaper than to any one else, and offered to transfer the lease to Northam when the agreement of November 16, 1855, was made; that the lease was then in the room where the parties were; that he first took a lease in 1837, and the present lease is a renewal of that; it has always been in his name; was present when the agreement of November 16, 1855, was signed; “told Northam he could see the lease if he wished; he said he was in a hurry, and didn’t care to see it;” that the office was built in 1837; the addition in

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1849; the new fence was built before the present lease was made by Lalouette; he occupied two or three years before the last lease was made.

Northam, being recalled, said he did not ask to see the lease, nor was there any offer to show it to him.

There was no evidence of any representations by L. & A. to induce the making of the agreement of November 16, 1855. There was evidence on both sides as to the value of the different articles, denominated fixtures and appurtenances, their value for continued use on the premises, and their value for the purposes of removal. *Northam*, on his cross-examination, said: "The fixtures were abandoned by me; some one came for me to take away the fixtures; spoke of the paving stones; the owner came and told me to remove the fixtures or he should send them to the public yard; I remember that circumstance now."

The fixtures and appurtenances are described in the schedule annexed to the agreement of November 16, 1855, as being "two offices, brick; one office desk; one sofa; chairs, washstand, scale and weights; two carts and harness; one horse; one safe, screens and shovels; one sleighbells; sheds; fence around yard; paving; sections; iron rods; hydrants; shop corner Division and Ridge streets."

The Judge charged that the plaintiff "had shown a sufficient title to the note to maintain this action thereon;" ordered a verdict for the amount claimed, subject to the opinion of the Court at General Term, and directed the jury to answer these two questions, viz.:

"1. What was the value of the fixtures on the 1st of April, 1857, viz., two offices, fence, paving, hydrant?"

"2. What was the damage to the defendant from the lease having less than two years to run from the date of the agreement, viz., increase of rent, expenses, (breaking coal,) cartage?"

The defendant excepted to the charge, and claimed the right to go to the jury on the question of ownership of the note and its transfer to the plaintiff. The Court restricted the summing up to the questions specially submitted to the jury, and the defendant excepted.

The jury rendered a verdict for the plaintiff for \$1,882.12, and answered the questions submitted thus:

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"First. Answer,.....	\$702 00
"Second. Answer,	\$300 00
Increase of rent,.....	73 84
Expenses, breaking coal,	20 00
Cartage,.....	18 00
	<hr/>
	\$411 84"

The plaintiff now moves for judgment on the verdict, and the defendant for a new trial.

A. *Wakeman*, for plaintiff,

Contended that there was no fraud; that the agreement fixed as the damages to be paid, (if there should be no renewal of the lease for that cause,) one-half of the loss on the fixtures, which the jury found to be worth, April 1, 1857, \$702; that according to the evidence they were worth half that to remove, viz., \$351, and one-half of this loss would be \$175.50; and that on the view most favorable to the defendant, only this sum could be deducted from the verdict.

And that the allegation in the answer, that he was obliged to abandon the fixtures, was untrue, the proof showing on the contrary; not only that he had full liberty to remove them if he saw fit, but that by the law of landlord and tenant he had a legal right to remove them without asking permission. (*Taylor's Land. and Ten.*, §§ 545, 546; *Van Ness v. Pecard*, 2 Pet., 137; *King v. Wilcomb*, 7 Barb., 263; *Dubois v. Kelly*, 10 id., 496; *Lawrence v. Kemp*, 1 Duer, 363; note to *Elwes v. Mawe*, 2 Smith's L. C., 99, 115; *Amos & Ferard on Fixtures*, 32.)

Also that the plaintiff had shown title to the note in suit. It is not necessary for an indorsee to prove that he paid value for the note. (*James v. Chalmers*, 5 Sand., 52; 2 Seld., 209.)

A. *McCue* for defendant.

I. The defendant's motion for a nonsuit should have been granted.

The plaintiff, when he rested, had not shown a *bona fide* ownership of the note.

II. The Court erred in not permitting the defendant to go to the jury upon the question of the *bona fide* transfer of the note

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and its ownership by the plaintiff. This was a question of fact clearly put in issue, and it was the right of the defendant to have it determined by the jury.

It is clear that the transfer was merely colorable and made for the convenience of Lalouette & Ashfield, they still retaining their actual interest and ownership. (*Killmore v. Culver*, 24 Barb., 656; *Andrews v. Bond*, 16 Barb., 633; *Bell v. Drew et al.*, 4 E. D. Smith, 59.)

III. The plaintiff not being the real party in interest cannot maintain the action. (§§ 111 and 113 of the Code.)

IV. The Court erred in submitting question No. 1 to the jury. The question was improper, both in form and substance.

The question should have been, "What was the value of the fixtures at the time the agreement for the purchase of the same was made?"

1. Because the damage which defendant sustained accrued immediately upon the breach of the warranty as to title. If Lalouette & Ashfield had no title to these fixtures at the time they attempted to sell and transfer the same, it follows that the use of these fixtures passed with the lease and the value of their use was covered by the rent reserved.

2. The question was improper in substance. The lease was dated March 3, 1851. The fence, offices, paving, hydrant, &c., were all on the premises at this date, and passed under the lease.

And if there were any doubts as to the intention of the parties, the covenant that Alfred Ashfield might erect and build an office on the premises and remove the same, shows that it was not intended that any other improvements should be removed. No office was built under this privilege. The lease expressly recognizes the existence of the office.

V. The second question was also improper. The plaintiff having taken the note after maturity, took it, subject to all the equities between the original parties; and the defendant had a right to set off against any recovery by L. & A. if they had sued the note, all damages sustained by him by the deceit and fraud.

The measure of damages was too restricted. The defendant should have been allowed for actual damage to his business.

The plaintiff is not entitled to any judgment, but there should be a new trial.

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BY THE COURT—MONCRIEF, J. The action was upon a promissory note, made by the defendant, bearing date 16th November, 1855, whereby twelve months after date he promised to pay to the order of P. H. Lalouette, for value received, the sum of \$1,648.28.

The complaint alleged an indorsement by the payee to Lalouette & Ashfield, and by the latter to the plaintiff.

The answer admitted the making of the note and the delivery thereof to Lalouette & Ashfield, but denied the indorsement by them to the plaintiff, and also denied that the plaintiff was the lawful owner and holder of the note, &c., &c.

To entitle the plaintiff to recover it was only necessary to produce the note at the trial, and prove the indorsements; possession of the note was *prima facie* evidence that he was the lawful owner and holder of it.

The plaintiff, when he rested, had shown a *bona fide* ownership of the note, and the exception taken by the defendant was therefore untenable.

There was no question of fact to be submitted to the jury. It was conceded at the trial that the plaintiff became possessed of the note after maturity; any defense, therefore, that could be urged against other parties to the note, might be maintained against the plaintiff. It was immaterial what consideration was given by him for the note; it was perfectly competent for Lalouette & Ashfield to give it to him.

To my mind it is quite clear that the only consideration for the note was the sale and delivery by Lalouette & Ashfield to the defendant of "all fixtures and appurtenances in, upon and appertaining to the coal-yard, known as 441 Grand street, and now (then) occupied by said Lalouette & Ashfield, and described in the annexed schedule."

The lease, which had "about two years to run," was sold for the consideration of one dollar. It contained "a free privilege to remove all the said fixtures at its expiration."

There is no difficulty in the present case arising from a refusal by the lessor to permit the fixtures to be removed; whether or not he could successfully have resisted the claim of the defendant to remove them can in no way be invoked; (*Ombony v. Jones*, 19 N. Y. R. 237; *Amos & Ferard on Fixtures*, 8;) the defendant was

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desired to remove them; no one prevented him. The landlord requested him to take them away; and the defendant did take some of the things specified in the schedule.

By express agreement if a renewal of the lease was not given Lalouette & Ashfield was to refund the one-half the loss on said fixtures.

The jury found, and upon the evidence it could not be questioned, that the value of the fixtures was \$702.

It is quite clear that the fixtures were worth one-half that sum if removed and taken away. Thus it is evident that the only damage which the defendant could have sustained, was \$351; the extent of the liability of the defendants on that account by agreement, being the one-half of this latter sum, is the sum of one hundred and seventy-five dollars and fifty cents.

The plaintiff should be permitted to enter judgment for the amount of the verdict, less the sum of \$175.50.

Ordered accordingly.

HENRY D. BROOKMAN *et al.*; Plaintiffs and Appellants, *v.* BENJAMIN F. METCALF, Defendant and Respondent.

1. A Mutual Insurance Company, for the purpose of increasing its available means, took up a subscription by which its friends agreed to give their notes for premiums in advance of insurances to be effected by them, the subscription not to be binding until \$300,000 was subscribed. When the subscription was understood and believed to be made up, no fraud being practised on the defendant, he gave his two notes for \$500 each for the amount of his subscription, and he effected actual insurance to an amount for which the premiums were over \$900, which was charged to him against his said two notes, and he, in addition thereto, took an open policy upon which the premium considerably exceeded the remaining \$100, but no other risks were indorsed thereon except those included in the \$900: *Held*, that the two notes for \$500 each were valid binding notes, although it afterwards appeared that the whole \$300,000 subscription was not made up; the notes having been voluntarily given and there being no fraud on the part of the Company or its Agent.¹

¹ *Holbrook v. Wilson*, (4 Bosw., 64;) *Holbrook v. Bassett*, (ante, p. 147.)

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2. A resolution of the Board of Directors directing the officers to proceed with certain notes, mentioned, to liquidate the indebtedness of the Company, is a sufficient authority to warrant the officers in settling an indebtedness to the plaintiffs by paying a part, appropriating an indebtedness from the plaintiffs not yet payable, in further payment, and transferring to them a portion of such notes as security for the balance on their agreeing to give further time of payment.
3. Such a transaction makes the plaintiffs *bona fide* holders for value in such sense that the transfer to them is valid, even without a resolution of the Board of Directors, though it exceeds \$1,000, if they have no notice of the want of such resolution.¹
4. In such case the maker of the note cannot use as a defense by way of set-off or counterclaim, an indebtedness by the Company to him for losses which did not become payable until after the transfer of his notes to the plaintiffs.

(Before WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, February 10th; decided, December 10th, 1850.

ACTION on a promissory note, dated November 8th, 1855, for \$500, made by the defendant payable to his own order, six months after date, and by him indorsed in blank.

The answer set up as a defense, that the note was given to the Atlas Mutual Insurance Company in pursuance of a subscription made by the defendant and others, by which they were to give their notes when \$300,000 was subscribed, and that the Company obtained the note from the defendant by fraudulently representing that the amount had been subscribed when in truth it had not. Also that the Company was insolvent when the note was transferred to the plaintiffs; that the plaintiffs took the note with knowledge of the circumstances and of the insolvency of the Company, and received it as collateral security for a preëxisting indebtedness and parted with no value therefor, and are not the lawful and *bona fide* holders or owners of the note for value paid before maturity.

The answer then avers that the Company are indebted to the defendant in the sum of \$2,300 for losses on property insured, &c., which sum the defendant will set up by way of set-off and counterclaim.

The issues were referred to MURRAY HOFFMAN, Jr., Esq., upon whose decision judgment was rendered for the defendant.

He found the following facts, viz. :

¹ *Scott v. Johnson*, (ante, 312;) *Smith v. Hall*, (ante, 319;) *Houghton v. Dodge*, (post.)

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"That the defendant made his promissory note in the pleadings mentioned, dated November 8th, 1855, for \$500, payable six months after date, to his own order, which was by him indorsed and delivered to the Atlas Mutual Insurance Company, in the manner and at the time hereafter stated.

"That the said Atlas Mutual Insurance Company, a corporation created under the laws of this State, caused to be circulated among its friends and customers a subscription, dated 8th November, 1855, whereby the subscribers agreed to give to the Company their notes in advance for premiums of insurance, payable at six and twelve months, in equal amounts, for the sums set opposite their names respectively, it being understood, that in consideration thereof, the subscribers were to be allowed by the Company, at the maturity of the notes, five per cent on the amount thereof, and that such subscription should not be binding unless \$300,000 were subscribed. That the defendant, at or about that time, subscribed \$1,000, the plaintiffs subscribed \$2,000, and many others subscribed different amounts.

"That having so subscribed, the defendant afterwards, and on or about the 12th day of November, 1855, effected a special insurance with the Company, and received a policy therefor, bearing date the day and year last aforesaid, the premium whereof amounted to the sum of \$401.25. That afterwards, and on the 24th of November in the same year, he obtained an open policy from the Company, the premium whereof amounted to \$500, on which the premiums of insurances subsequently taken out by the defendant amounted to \$113.63; and that afterwards, and on or about the 1st December, 1855, he effected another special insurance with the said Company, and received a policy therefor, dated the day and year last aforesaid, the premium whereof amounted to the sum of \$386.25. That the defendant did not pay the premiums aforesaid, but the same were charged to him in account.

"That at a meeting of the Board of Directors of the Company, held on the 30th November, 1855, a resolution was adopted, whereby, after reciting that it was understood that \$300,000 had been subscribed, it was resolved that the officers commence to collect the notes to that amount, and proceed in liquidating the liabilities of the Company.

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"That the defendant, after the insurances had been effected by him as aforesaid, was called upon for his premium notes, whereupon he gave the Company his two promissory notes for \$500 each, one of which is the note in controversy in this suit. That the defendant was charged in the books of the Company with the aforesaid premiums of insurance, and credited with the notes last mentioned.

"That on the 10th December, 1855, the Company was, and for more than a month previously thereto had been, indebted to the plaintiffs in this action upon three several promissory notes, amounting to the sum of \$10,139.27, two of which notes, amounting together to \$5,574.56, were then past due, but the third had not yet matured.

"That the plaintiffs received from the Company, at that time, in payment of the two notes which had so matured, \$2,000 in cash, with a credit for their subscription of \$2,000, and the Company's note, payable in four months from date, for \$1,751.95, being the balance of the said two notes, together with the defendant's two notes, so given by him as aforesaid, as collateral security for the payment of the Company's new note for \$1,751.95 above mentioned, and thereupon the plaintiffs gave up to the Company the said two notes which had so matured as aforesaid.

"That the Company's note for \$1,751.95, so given to the plaintiffs as aforesaid, has not been paid, nor have the plaintiffs collected the amount thereof from the securities aforesaid, and the note is still held and owned by the plaintiffs.

"That there was no resolution of the Board of Directors authorizing such transfer of the notes to the plaintiffs, except what is contained in the aforesaid resolution of the 30th November, 1855, at which meeting four of the five directors constituting the Finance Committee were present and voted in favor of the resolution.

"That this transaction was conducted in good faith on the part of the plaintiffs, and under the belief that the notes were valid, and that the Company had power to make a valid transfer of the same to the plaintiffs for the purposes intended, and neither the Company nor the Receiver thereof has hitherto, in any way, repudiated the transfer thereof

"That the subscription of \$300,000 was not full at the time the defendant gave his notes, nor has that amount been subscribed in binding subscriptions.

"That the Company having failed, an injunction was served on its officers the 5th of March, 1856, and a Receiver thereof was appointed on the 21st of the same month.

"That on the 28th of the same month of March the defendant entered into an agreement with the said Receiver to cancel the two special policies which had been issued to him on the 12th November and 1st of December, as before stated; and by an indorsement in writing on the back of each of the said policies, signed by the Receiver, it was declared that the said policies were thereby canceled; and the defendant was entitled to the amount of return premium thereon specified, "to be paid to the holder out of the assets of the Company, ratably with all legal claims for losses." And there is also a balance to the credit of the defendant in his account with the Company of \$98.87, being the amount of the said two notes left after charging against them the premiums of the two special policies, and the premiums actually earned on one open policy of \$500.

"That the defendant is the holder of the said two several policies, and entitled to such return premium.

"That the Company is also indebted to the defendant to an amount exceeding that due on the note in controversy, for losses which occurred after his notes were transferred to the plaintiffs, as above stated, but before and were payable before their maturity.

"Upon the foregoing facts I do find, as conclusions of law :

"That as the subscription for \$300,000 was not filled, the Company could not have demanded from the defendant notes in pursuance thereof; but inasmuch as the Company had issued policies to the defendant, and as he had become, and was at the time the notes were given, a debtor for the premiums thereon, the notes were founded upon a good and valid consideration, and were valid notes in the hands of the Company.

"That the notes were transferred by the Company to the plaintiffs, in contravention of the provisions of the Revised Statutes; and that the plaintiffs are not purchasers for valuable consideration.

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"That, therefore, there was no valid transfer of the said note to the plaintiffs, and that by reason of the offsets the defendant would have against the Receiver of the Company, if the suit were prosecuted by him, he can set up this defense. That if the said note was legally transferred to the plaintiffs, yet, as no value was given therefor, the defendant is entitled to set off in this action the several losses mentioned in his account, and also the amount of return premium (\$454.50) so adjusted with the Receiver as aforesaid, and the said balance of \$98.87, which sums I have allowed; and exceeding, as they do, the plaintiffs' claim, I do find and decide that there is nothing due from the defendant to the plaintiffs in this action.

"Dated NEW YORK, July 30, 1858."

On the trial, besides the proof stated by the Referee, the by-laws of the Company were produced, and the tenth and twelfth thereof read as follows:

"By-Law X.—The President or Vice-President, with the advice and consent of the Finance Committee, or a majority of them, shall have authority to assign, transfer, or otherwise validly dispose of any bond and mortgages, stocks, bills receivable, or any assets of the same, in order to convert the same into money, or to secure the repayment of money borrowed by the Company through them, the payment of losses, or other purposes that shall have been sanctioned by the Finance Committee.

"XII. Immediately on the adoption of these by-laws, and annually thereafter, at the first meeting of the Board after each annual election of Trustees, the President, or, in his absence, the Vice-President, shall nominate, and the Board appoint, three Standing Committees, viz.:

"First.—A Finance Committee of five Trustees, three of whom shall constitute a quorum; said Committee, or a majority of them, shall have power to loan, invest or otherwise dispose of the cash funds, stocks and assets of the Company, in any way they may deem conducive to the interests of the Company, in accordance with the charter and by-laws. They shall also examine the statements of the affairs of the Company from time to time, together with the assets, and compare the same with the books, and, in general, exercise supervision over all the financial affairs of the Company."

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It should also be stated that no part of the amounts due to the defendant from the Company became due until some time after the note in suit was transferred to the plaintiff.

Exceptions were filed to the decision of the Referee, and from the judgment entered on his decision the plaintiffs appealed.

E. H. Owen, for plaintiffs, (appellants.)

I. The note in suit was founded upon a good and valuable consideration, and was valid in the hands of the Company at the time of its transfer to the plaintiffs. In this respect the Referee has decided correctly, because:

1. At the time the defendant gave the note, he was justly indebted to the Company for premiums in an amount exceeding the note in question.

It is not pretended that the subscription was obtained by fraud. It was fairly obtained, although it was not to be binding unless the amount specified should be subscribed.

The insurances which the defendant afterwards effected, and for the premiums on which he became indebted, were likewise made in good faith, without any condition or qualification; and it is not pretended that there were any representations or other acts, which in any way invalidate the same; whether, therefore, the subscription which was then in circulation, was or was not full, is immaterial as regards the indebtedness for such premiums.

II. The note was given and received in settlement *pro tanto* of such indebtedness.

In the absence of any proof to the contrary, this would be the legal inference. Giving the note is *prima facie* evidence of an accounting and of the defendant's indebtedness. (*Lake v. Tysen*, 2 Seld., 461; *Defreest v. Bloomingdale*, 5 Denio, 304.)

3. There was no fraud in obtaining the notes, nor anything connected therewith which rendered them invalid, even in the hands of the Company.

While there was nothing wrong either in obtaining the subscription, or effecting the insurances, yet it is alleged that when the defendant was called upon to give the notes, he was told that the subscription had been filled, whereas, in fact, it was not so.

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It does not, however, appear that the defendant gave the notes relying solely upon the truth of such representation. On the contrary, it appears that he made inquiries of various subscribers, and finding that some had given their notes, and others were about giving them, he gave the notes in question.

II. The note in suit was legally and properly transferred to the plaintiffs before maturity, and they are the lawful owners and holders thereof for value.

Having been indorsed in blank, it was negotiable and transferable without any other act of the Company than the mere delivery with intent to pass the title thereto.

Such transfer and delivery was not in contravention of any provision of the Revised Statutes, and the Referee has erred in deciding to the contrary.

The provisions of the statutes referred to (1 R. S., p. 591, §§ 8, 9,) are not applicable to this case, because:

1. The plaintiffs were purchasers for a "valuable consideration and without notice," and therefore within the exceptions of the 8th section.

There is no evidence of notice that a previous resolution (which is the "notice" referred to in that section) had not been passed.

The Referee has, in effect, found that the transaction was conducted in good faith, and under the belief not only that the notes were valid, but that the officers had power to make a valid transfer thereof to the plaintiffs. (*Howland v. Myer*, 3 Comst. R., 290.)

The plaintiffs settled with the Company, paid their subscription before maturity, gave up and extinguished the notes upon which they had an immediate right of action, and extended the credit for a portion of their demand, which was a "valuable consideration" within the authorities upon that subject. (*White v. Springfield Bank*, 3 Sandf., 222; *Youngs v. Lee*, 2 Kern., 551; *Gould v. Segee*, 5 Duer, 260; *Goodman v. Simonds*, 20 How. U. S. R., 343, 370; *Hart v. Hudson*, 6 Duer, 304; Story on Prom. Notes, § 186; *Finley v. Prichard*, 2 Saund. R., 151; *Stalker v. McDonald*, 6 Hill, 93.)

As pledgees, the plaintiffs, on default of payment of the principal debt, were entitled to sue the collaterals. (*Wheeler v. Newbold*, 5 Duer, 29; *S. C.*, 16 N. Y. R., 392.)

2. If the 8th section would have otherwise applied, still the charter of this Company has created an exception, rendering such previous resolution unnecessary.

The 12th section of the charter of the Atlantic Mutual Insurance Company, (Laws 1842, chap. 217, § 12,) which, by the 8th section of the charter of this Company, is incorporated therein, (Laws 1843, chap. 92, § 8,) authorizes the Company to "receive notes for premiums in advance," and to negotiate such notes for the purpose of paying claims, "or otherwise in the course of its business."

If, therefore, the notes in question fall within the class, referred to in the charter, (as they may under the circumstances,) then no resolution was necessary.

If the 8th section conflicts with the charter, the former must yield to the latter as the last expression of the legislative will. (*Howland v. Myer*, 3 Comst., 290.)

3. Regarding the notes, however, as ordinary "premium notes," and not of the kind referred to in the charter, still it was not indispensable to the legality of such transfer that a previous resolution of the Board should be passed authorizing the same.

Any approval of such transfer, however manifested, whether before or after the transaction, would be sufficient authority. (*Curtis v. Leavitt*, 15 N. Y. R., 11.)

Such authority and approval were given and manifested.

(a.) By the by-laws, (authorized by charter,) appointing a Finance Committee, President and Vice-President, with power, under the advice of such committee or of a majority, to transfer or otherwise dispose of notes, &c.

(b.) By a resolution of the Board, passed 30th November, 1855, at which a majority of the Finance Committee were present, authorizing the officers to collect the notes and proceed in "liquidating the liabilities of the Company." And,

(c.) By the acts of the Finance Committee and officers, and their and the Receiver's entire acquiescence in the arrangement.

III. The defendant is not entitled to set off in this action his alleged claim against the Company, for—

1. If the transfer was legal, and the plaintiffs be considered *bona fide* holders of the note for value, without notice, then no

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claims of the defendant against the Company, however valid, can be set off. (Code, § 112; 2 R. S., 354, § 12, subd. § 9; *Beckwith v. Union Bank*, 4 Sandf., 604; S. C., 5 Seld., 211; *Spencer v. Babcock*, 22 Barb., 335.)

2. But if otherwise, and if the defendant (as was decided by the Referee) is entitled to set off any claim, which he might have done if the action had been brought in the name of the Receiver, still he was not entitled to set off either the return premiums or the losses claimed, because neither was in existence at the date of transfer, and therefore not the subject of set-off. (*Furniss v. Gilchrist*, 1 Sandf. R., 53.)

(a.) As to the return premiums, they were to be paid in a special manner "out of the assets of the Company ratably, with all legal claims for losses," and in no other way.

The Receiver was not required to cancel the Policies, (2. R. S., 470, § 85,) and instead of doing so, he might have suffered the risks to continue, in which case the insolvency of the Company would not have furnished any defense to an action upon the notes given for the premium. (*Hone v. Boyd*, 1 Sandf., 481.)

(b.) The losses should not have been allowed, because

Neither of them was due or payable when the transfer was made, nor even when the Receiver was appointed, and not then a valid set-off.

The Receiver was appointed the 25th March, 1856. The "papers," i. e., the preliminary proofs, were left with the Company for "adjustment," in one case on the 8th, and in the other on the 21st of February of that year; such losses were, by the terms of the Policies, not payable until thirty days thereafter, which would be after the appointment of the Receiver, and therefore not susceptible of set-off as against him. (*Haxton, Receiver, v. Bishop*, 3 Wend., 13; *Furniss v. Gilchrist*, 1 Sandf., 53.)

The judgment should be reversed, and a new trial ordered.

G. Dean, for defendant, (respondent.)

I. The plaintiffs were not entitled to recover, because the proof did not sustain the allegations of the complaint.

They were not the absolute owners, but held the notes in trust, and, when paid, the right to possession would revert to the Atlas Insurance Company.

This action is prosecuted for the benefit and on account of the Atlas Insurance Company.

It is questionable whether the plaintiffs can sue even as Trustees, inasmuch as the instrument under which they were transferred gives them liberty only to "dispose of them for account of the Company." (*Nelson & Sturges v. Eaton*, 7 Abb. Pr. R., 305; *Albany Fire Ins. Co. v. Bay*, 4 Comst., 9; *Waldron v. McComb*, 1 Hill R., 111; *S. C.*, 3 id., 361.)

II. The fact found by the Referee, that this transfer or trust was in violation of the statute, and therefore void, because not authorized by a previous resolution of the Board of Trustees, is supported by the evidence, and disposes of the whole case.

In the case of *Howland v. Myer*, (3 Comst., 290,) the plaintiff was a *bona fide* holder, and the decision is put on that ground.

The resolution of 30th November is not an authority for this transaction; because it was founded in an error of fact, if not in a fraudulent misrepresentation. And also it does not authorize the liquidation of the liabilities with the notes.

But if it did, the President was not thereby authorized to deposit with creditors assets of the corporation to an unlimited extent on such trusts as he should choose to create.

Palmer v. Yates, (3 Sand., 152,) and *Curtis v. Leavitt*, (15 N. Y. R., 9,) are cases where the parties came within the exception to the 8th section.

III. The defendant was in a position to avail himself of this defense, because he was a creditor and member of the corporation.

1. A corporation, or its stockholders, or Receiver, may in every case impeach any contract made by Directors or other officers or agents, in the name and professedly by such corporation, by showing that such contract was made in a manner or for a purpose not authorized by its charter or the laws of the land. (*Hodges v. The City of Buffalo*, 2 Denio, 110; *McCullough v. Moss*, 5 id., 567; 3 B. & Ald., 1; 1 Hill, 11; 4 id., 442; 3 Comst., 430; 1 id., 19.)

2. The transfer being contrary to law and public policy, is void, and there is defect of title in the plaintiff. (*Johnson v. Bush*, 3 Barb. Ch. R., 207; Code, § 111.)

IV. As there had been no valid transfer of the title to this note, the defendant had a right to avail himself of any defense

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which he could have made, if the action had been brought by the original holder, viz.:

Want of consideration; fraud in obtaining it. (*Stewart v. Trustees of Hamilton College*, 2 Denio, 403.) Set-off under the statute. (2 R. S., 354, § 12, subd. 10; 1 Sandf., 53; *id.*, 257.) Counterclaim under sections 149 and 150 of the Code. Any matter constituting a defense. The right of the defendant is expressly reserved by section 112 of Code.

V. Defendant's demands consisted of a loss adjusted in February, and therefore liquidated and due.

Of claims for return premiums. Of \$97.87, the balance of the two notes after charging against them all premiums. It is insisted that under the finding of facts these constituted a defense to the notes. (*Holbrook v. Receiver Am. Ins. Co.*, 6 Paige, 222, 228; *in the Matter of the Receiver of the Globe Ins. Co.*, 2 Edw. Ch. R., 625.)

MONCRIEF, J. The note was valid in the hands of the Company.

The Referee so found, and correctly. (16 N. Y. R., 324.) In respect to creditors of the Company, in good faith and in the usual course of business, it was payable absolutely and in full. There was an actual loan of money at the time of transfer in this case. (*Ogden v. Andre*, MS.; heard, April, 1859; decided, May 21.)

The transfer to the plaintiff was made in good faith.

The Referee so found, and, I think, correctly. Neither the Receiver of the Company nor any of its officers has ever demanded or claimed the return of this note. The Referee so found.

There was no offer to show that the plaintiffs had any reason to suppose there was no resolution of the Board of Trustees authorizing the transfer. The fact that the plaintiffs received the note from the officers of the Company did not charge them with such notice. All dealings with a Company are done with its officers.

Such a resolution is not, under all circumstances, indispensable to a valid transfer. In *Howland v. Myer*, (3 Comst., 290,) the plaintiff dealt directly with the officers of the Company, and that case decides the precise point that the absence of a resolution would not defeat a recovery.

¹ Since reported, 4 Bosw., 582.

The Company had power to make the transfer. (3 Comst., 290.) The power was sufficiently exercised to pass the note to the plaintiffs.

The resolution of November 30, 1855, was passed at a meeting of the Board of Trustees, (eleven members being present, and four of the Finance Committee,) and it directed "that the officers commence at once to collect the notes to that amount, (\$300,000,) and proceed in liquidating the liabilities of the Company therewith."

By-law X expressly authorizes the President or Vice-President, with the advice and consent of the Finance Committee, or a majority of them, to assign, transfer, or otherwise validly dispose of, bills receivable, or any assets, to secure the repayment of money borrowed by them, the payment of losses, or other purposes, that shall have been sanctioned by the Finance Committee.

The two notes, held by the plaintiffs past due, were pressing for payment. They probably were for losses. It was an undisputed claim against the Company.

At the meeting of the Board of Trustees on the 7th November, all of the Finance Committee were present, when the "Committee appointed to settle with Mr. Brookman, (plaintiff,) reported that they had not yet completed the settlement." (The programme for procuring the necessary means had not yet been matured. The subscription list is dated the next day, the 8th.)

At the time of the transfer, December 10th, the President, Vice-President, and two of the Finance Committee were present. (Probably others sanctioned it.) It required but three members to constitute a quorum of the Finance Committee, a majority of whom could transfer, &c., &c. The transfer has never been repudiated, and no question ever raised as to the proper transfer to the plaintiffs, except by the defendant.

GARDINER, J., (3 Comst., 292,) says: "I apprehend that the Company were not restricted by the statute to a negotiation for the purposes of payment exclusively. They might procure the note to be discounted, and apply the avails in discharge of their responsibility for losses incurred; or, if this could not be done, the same result might be obtained by a transfer of the note to the plaintiff, upon the indorsement of the Company—the creditor giving time until the securities matured."

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It will be borne in mind that the note in that case was transferred by the President as collateral security. The point is expressly taken, (2 Sandf., 180-183;) and it is at least doubtful whether the loss was contingent or absolute for which it was given to secure the payment. It is questionable whether anything was given up at the time of receipt of the note.

In the present case, an absolute liability of the Company existed. Two notes of the Company, over due, were in the hands of the plaintiffs, and they were pressing payment. The claim was indisputable. The amount was \$5,574.56. The Company, at the time of the transfer of this note to the plaintiffs, paid them \$2,000 in cash, and the plaintiffs permitted the Company to charge them their subscription of \$2,000 as cash, thus leaving due to them, at the time of the transfer, the sum of \$1,574.56 and interest.

Upon receiving the note of the Company for the balance due on those two notes—\$1,574.56 and interest—\$1,751.95—and the note in suit, with others, as collateral, the plaintiffs gave up the existing liability of the Company. The two notes were given up.

It seems clear to my mind that the present is a stronger case than *Aspinwall et al. v. Myer*, (2 Sand., 100,) and is embraced and determined by the principle laid down in 3 Comstock, 290.

Again, I do not see how it can justly be said that this transaction conflicts with section 8 of the statute. The act was passed to prevent insolvency. The arrangement entered into with the plaintiffs assisted the statute, in enabling the Company to continue its business, and actually did earn for the defendant a large amount of premiums which he did not pay to the Company.

In my opinion the Referee erred, and a new trial should be directed, &c.

WOODRUFF, J. The defendant had by a subscription with others agreed to give to the Atlas Mutual Insurance Company, notes in advance for premiums to the amount of \$1,000. He did so in two sums of \$500 each. The condition of the subscription was that it should not be binding until the sum of \$300,000. was subscribed, and if it had never been subscribed the Company could not have required the defendant to give the notes; but on the other hand he could waive the condition and if

he afterwards gave the notes and no fraud upon him is shown, he must be deemed to have waived the condition by voluntarily giving the notes to the amount of such subscription; and on this ground alone I regard the notes as valid, binding notes even in favor of the Company, although the fact be taken to be as the Referee has found, that the \$300,000 subscription was not made up. If it were material, the correctness of that finding upon the evidence might be questioned. But still more clearly is the defendant bound in this case, for after his subscription he took out policies of insurance, the premiums upon which (exclusive of unearned premiums on his open policy) was nearly equal to the amount of his two notes. As that open policy was taken in pursuance of his subscription and in performance of his agreement, I apprehend the Company were entitled absolutely to require that the whole amount of the premium be paid. It was not the ordinary case of an open policy, on which premiums can only be collected to the amount of the risks indorsed thereon.

After not only giving his notes but actually receiving policies for the amounts, and more than the amounts of his notes, it is too late for him to say, in the absence of any fraud, that the \$300,000 subscription was not made up. (*Holbrook v. Wilson*, November Term, 1858; ¹ *Holbrook v. Basset*, July, 1859.)

The defendant had agreed to give notes in advance.

The note in question was therefore not only a note given for value in due course of business, but it was also a subscription note given in advance for premiums under the 12th section of the charter of the Company.

By the terms of that section, the Company were authorized to negotiate such note for the purpose of paying claims or otherwise in the course of its business.

It has often been held that such notes are valid binding notes, founded on sufficient consideration, and subject to transfer as business notes.

By the tenth of the by-laws of the Company the President or Vice-President, with the advice and consent of the Finance Committee or a majority of them, has authority to transfer bills receivable to secure the payment of losses or other purposes that shall have the sanction of the Finance Committee.

¹ 4th Bosworth, 64. ² *Ante*, p. 147.

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On the 30th of November, 1855, the Board of Directors, after reciting the subscription which the defendant and others had made in advance of premiums, resolved "that the officers commence at once to collect the notes * * * and proceed in liquidating the liabilities of the Company therewith."

The Company was at that time indebted to the plaintiffs in a large amount.

On the 10th of December, two notes of the Company, amounting to \$5,574.56, were past due.

The statute authorized the Company to transfer the note in question for any lawful purpose in due course of business.

The Board of Directors, by a specific resolution, authorized the officers of the Company to proceed at once in liquidating the indebtedness of the Company with this and other notes mentioned.

Here was authority enough, in my opinion, for the action of the officers.

Thereupon, a settlement was made with the plaintiffs in which they accepted \$2,000 in money; consented to apply \$2,000 of the money due to them on a subscription also in advance of premiums, thus accepting as cash a subscription for which they were entitled to give notes on time; and agreed to give time for the payment of the residue of the sum then due to them for four months; in consideration of which the officers transferred to them the note in question as security for the payment of such residue at the end of such four months.

I think this was a valid transfer, authorized and upon sufficient consideration and in no wise inhibited nor invalidated by the statute.

If this be so the decision of the Referee was erroneous. At the time of the transfer to the plaintiffs, there was nothing due to the defendant, and therefore there was no right of set-off which can defeat the plaintiffs' recovery.

If there be no existing debt due to the defendant, at the time of the transfer of his note, he cannot set off a debt subsequently becoming due as against the assignee, although the assignment be made to secure an antecedent debt. In other words, an assignee, although he takes a note to secure a prece-
dent debt, if there be no fraud, can collect such note notwithstanding his assignor may, by debts becoming due after the

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assignment, owe the maker of the note the same or a greater amount.

Besides, in this case, the plaintiffs received the note, as already stated, for a sufficient consideration in the consent to allow as cash a subscription for which they had a right to give notes on time, and in the forbearance of the residue of the debt due them.

It is claimed, that inasmuch as the receipt given by the plaintiffs for the note in question, as collateral security to the note of the Company, contained a reservation of authority to sell the notes, if the note of the Company was not paid, that therefore a sale was the plaintiffs' only remedy. That they are mere trustees to sell for account of the Company, and cannot sue on the notes. This claim is groundless. They received the notes as security, and have the legal title. They can, therefore, sue and collect the note. They have also the equitable title, holding the note as security they have a right to retain the money collected, and the circumstance that when collected it will go so far towards discharging the debt of the Company is only what is always true when the holder of such securities collects them. In that sense only the collection is for account of the principal debtor. (*Nelson v. Wellington*, July Term, Superior Court, 1859.)¹

I concur, therefore, in the result to which Justice MONCRIEF has arrived.

The judgment must be reversed, and a new trial ordered. Costs to abide the event.

Ordered accordingly.

JOSEPH T. GILBERT *et al.*, Plaintiffs and Appellants, v. THEODORE BEACH, Defendant and Respondent.

1. The owner of a lot of ground, who has contracted with masons, carpenters and other mechanics of competent skill, for the erection of a building thereon, in a safe and proper manner, is not responsible to third persons for injuries caused by the mere negligence of the contractors' servants in the prosecution of the work.

¹ *Ante*, page, 173.

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2. Where, by the contract with the carpenters, (in such case,) they had agreed to construct a suitable gutter to receive the water falling upon the roof, and a leader running down to the basement, where it was to be connected with a main pipe leading into the sewer, and the carpenters had left the leader unfinished over the Sabbath, not extending within twelve or fifteen feet of the ground, and negligently omitted to provide effectual means of carrying off the water, in consequence of which, during a storm, the water flowed through the leader to the ground, and thence into the premises of the plaintiffs next adjoining, and caused injury to their goods: *Held*, that the owner is not liable for the damages.
3. *Held*, also, by the Superior Court, that the neglect of the plumber, who was to furnish and introduce the main pipe leading to the sewer, to introduce it in due season and before the storm, was no excuse to the carpenters for not extending the leader down to the basement, and did not make the owner liable. But held, in the Court of Appeals, that if the neglect to put in the main pipe caused the accident, it was the duty of the owner to cause it to be done, and he is not excused by reason of his having contracted with the plumber to do it.

(Before HOFFMAN, SLOSSON and WOODRUFF, J. J.)

Heard, November 7th; decided, December 10th, 1859.

THIS action was brought to recover damages from the defendant for injury to the goods of the plaintiffs from water which flowed from the defendant's lot into the lower story of the store of the plaintiffs, and for the expense of removing the water. At the time of the injury, a building was in course of erection on the defendant's lot, and during a heavy rain, at night, the water flowed from the roof through a leader in the rear, which reached to within about twelve or fifteen feet of the ground, and in consequence of the insufficient precautions used by the persons employed in erecting the building, it then fell to the ground and flowed into the adjoining store belonging to the plaintiffs.

The cause was tried in May, 1854, and a verdict for the plaintiffs was taken, subject to the opinion of the Court, and upon a hearing in General Term, in March, 1855, judgment was ordered for the defendant. The pleadings and a statement of the facts proved are contained in the report of the case in General Term. (4 Duer's R., 423.) On appeal to the Court of Appeals, the proceedings were held a mistrial, and the judgment was reversed upon that ground. (16 N. Y. R., 606.)

The case was again brought to trial on the 7th day of April, 1859, before Mr. Justice SLOSSON and a jury, and upon a state

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of facts, in substance such as contained in the former report of the case in 4th Duer, the Judge instructed the jury that the defendant was entitled to their verdict, which being rendered, and judgment thereon entered, the plaintiffs appealed to the General Term.

The only fact not stated in the former report which it seems material to mention, is, that it having been shown that the owner of the lot (the defendant) had made contracts for the erection of the building, and by his contract with the carpenters, they had agreed to supply and put up a leader to extend from the gutter at the roof down to the basement, there to be connected with the main water pipe running into the sewer, and that the leader had not been brought down to the basement, nor lower down than within twelve or fifteen feet of the ground, by reason of which the water flowed into the store adjoining; proof was given tending to show, on the one hand, that the defendant was himself to furnish the main water pipe in the basement; and, on the other, that one McKensie, the plumber, had contracted to furnish and introduce it, and that he had improperly delayed doing so. And it was claimed that the want of the main pipe in the basement delayed the extension of the leader and the making the required connection with the sewer; and on the other hand it was insisted that the leader should have been continued down to the basement, whether the connection could then be formed or not, and that the negligence of the carpenters in not doing this, was the sole cause of the flowing of the water into the plaintiffs' store.

E. W. & G. F. Chester, for plaintiffs, (appellants,)

Urged the same arguments in substance stated in the former report, (4 Duer, 426,) and cited additional authorities. (*Kelly v. The Mayor*, 1 Kern., 482; *Pack v. The Mayor*, 4 Seld., 222; *Hutson v. The Mayor*, 5 id., 163; *Storrs v. City of Utica*, 17 N. Y. R., 104.)

Also that the building, in the condition it was on the night of the storm, was a nuisance, and the defendant, as owner, was liable on that ground.

Also, that inasmuch as the carpenters could not complete the leader until the main pipe was introduced into the basement, they were not in fault.

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That the defendant was responsible for the delay, and even if he had contracted with McKensie, that did not relieve him.

John E. Parsons, for defendant, (respondent,)

Urged the points made on the former argument, and also that as the erection of the building was a lawful act, the owner is not responsible for the negligence of the contractor in the manner of doing the work, or in the condition in which he carelessly leaves the building during the erection, provided the contract calls for the erection in a proper manner, and guards against such accidents. (*Vaughan v. Menlove*, 3 Bing. N. C., 468; *Reedie v. London & North Western R. R. Co.*, 4 Welsb., H. & Gord., 254.)

Also that the defendant is not liable on the ground that the condition of the building constituted a nuisance. The overflow happened only on a single occasion. It was not continued. He had no notice of the unfinished state of the leader. (4 Welsb., H. & Gord., 254; *Fish v. Dodge*, 4 Denio, 311; *Penruddock's case*, 5 Coke R., 100.)

BY THE COURT—HOFFMAN, J. The propriety of the direction given by the Court, at the trial of this cause, depends upon the applicability of the rule laid down in *Blake v. Ferris*, (1 Seld., 48,) as the same is analyzed and explained in *Storrs v. The City of Utica*. (17 N. Y. R., 104.) We infer from these cases, and from those cited in the opinions therein, that, if the party sought to be charged had no direct participation in the act or default which caused the injury, if his immediate agents or servants had no such participation, and if the persons who caused such injury were the servants of another who possessed the whole selection, control and direction of them, that party cannot be rendered liable.

The question, whether the owner of real estate is liable, at all events, for injuries to third persons, happening through the negligence of those who may, for the time being, be in the charge thereof or engaged in making an erection thereon, we do not consider, with us, an open question. The opinion pronounced by OAKLEY, Ch. J., upon the merits of this case, after what has been pronounced a mistrial, (4 Duer, 423,) shows, we think, that the decisions of the Court of Appeals, as well as the Courts of

England, (if the principles propounded in the opinions delivered are to be adhered to,) forbid us to hold that the defendant here is liable as owner of the premises upon which the negligence occurred which caused the damage to the plaintiffs, irrespective of the questions whether the negligent parties were his servants, and whether there was any negligence or misconduct on the part of the defendant himself. Until the principle stated in *Blake v. Ferris*, (*supra*;) *Stevens v. Armstrong* (2 Seld., 435;) *Pack v. The Mayor*, (4 id., 222;) *Kelly v. The Mayor*, (1 Kern., 432,) and *Storrs v. The City of Utica*, (*supra*;) shall undergo some further modification, we must regard those questions as material, and the answers thereto as decisive in determining the liability.

As stated in the opinion of Chief Justice OAKLEY, the liability of the owner of real estate for erecting or maintaining a nuisance upon his own land is not doubted; but we are forbidden to apply that principle to a case in which the owner has contracted for the erection of a suitable building in a proper manner, and with a person or persons of competent skill, so that, if what is done is done according to the contract, no injury will happen to third parties, and he has no such notice of the omission or neglect of the contractors endangering others as requires him to interfere.

On these points, therefore, the opinion before given properly governs us on this appeal, if the facts proved on the trial bring the defendant within the rules there stated.

The defendant had contracted with Young & Vreeland, carpenters, and with sundry other mechanics, for the erection of the building in question. It is not denied or questioned, that the contracts made were with persons of proper skill, or that the contracts did not provide in all respects for a building which the defendant had a right to erect upon his own lot, and which would be safe and proper; or that the manner in which it was to be erected was not in all respects, safe, prudent and proper; or, in short, that, if all had been done in the manner in which the defendant contracted that it should be done, no nuisance would have been created, and no injury would have happened to the plaintiffs. If this be so, it seems necessarily to result that the only question before us is this: Is the defendant responsible for the manner in which the contractors perform their work; or for the negligence of the workmen in carrying it on? And, in considering this, it

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is to be observed that the testimony is distinct and uncontradicted that Young & Vreeland, the carpenters, during that stage of the work in which the injury complained of occurred, had the custody and control of the building; their foreman had the keys, locked it at night, and opened it when he commenced work in the morning; and that, although the defendant was at the building three or four times a week, he gave no directions.

The contract between the defendant and Young & Vreeland, so far as it is pertinent to the present question, called for "a copper gutter of at least eight inches in diameter, put on the top of the rear wall, shaped so as to form the crown moulding of the cornice, well braced, and connected with the leader in a good manner; a five-inch double cross tin leader, with a square basin of twelve inches on the top to receive the water, running down to the basement, where to be connected with the main water-pipe running into the sewer; another copper gutter, of four inches diameter, to be put on the first story rear extension wall, well braced and made tight, connected with a three and a half inch leader running through the rear wall into the basement, where it is also to be connected with the main pipe."

It is not questioned that the leaders so provided for were entirely sufficient to conduct all the water from the defendant's building into the basement thereof, and that, if the leaders had been brought down to that basement on the night of the storm, the injury to the plaintiff's goods could not have happened.

It is quite clear that the terms of this contract with Young & Vreeland required that the leaders be brought down to the basement, with a view to their being there connected with the main water-pipe.

But the leader from which, on the night in question, the water flowed, causing damage, was only brought down to within about twelve or fifteen feet from the rear area, and from ten to fifteen feet from the rear window of the counter cellar of the defendant's store, and a temporary and insufficient arrangement was attempted by which to conduct the water from the lower end of this leader into the basement or counter cellar, which, if it had been successful, would have prevented the accident. A gutter, formed of boards nailed together, was placed at the end of the leader, and passed through the basement window and downward into the

cellar. But the prostration of this temporary gutter, by the force of the fall of water through the leader, left the water to flow to the pavement and thence to the rear of the plaintiffs' store, and was thus the immediate cause of the damage sustained by them. And this was owing to the insufficient manner in which the temporary gutter was secured, or to its inadequacy to carry off the water, and not at all to any inadequacy of the protection to the plaintiffs, if, in fact, the water had been conducted into the defendant's basement or counter cellar.

The immediate cause of the accident was therefore the fault and neglect of Young & Vreeland. First, in leaving the leader twelve or fifteen feet above the area instead of bringing it down to the basement as their contract required, and second in not suitably guarding it by other means for carrying off the water while it was left in that state. Had the leader been brought down to the basement, the water would have flowed into the defendant's premises and there is no pretense that the plaintiffs could have been injured whether the water had remained in the defendant's cellar or been led off to the sewer. Young & Vreeland had no right to so endanger the plaintiffs' property by not bringing down the leader to the basement, as by their contract they were bound to do. The thing they had contracted to do, and which alone the defendant had authorized them to do, was safe and proper, and it was agreed to be done, and alone authorized to be done, in a safe and proper manner. The defendant had given them the custody and control of the work, and he neither interfered with the manner of the performance nor had any control over their agents or servants in the management thereof.

The view, therefore, suggested above, recurs; the injury has happened, not by the defendant's fault or neglect; not because he has done, or authorized to be done, anything which if done, and as authorized by him to be done, was injurious or dangerous, but because the servants or agents of the contractors were negligent in the manner of doing it, and contrary to the contract left a portion of the work over Sunday in such a condition as to cause the damage.

Unless, then, the views expressed upon the former hearing, and what are understood to be the principles of the cases above referred to, are to be rejected by us, the liability for this accident

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rests on Young & Vreeland and not on the defendant, if the facts proved do not furnish to them some excuse which shifts the responsibility.

An attempt was made to show such an excuse, and by reason thereof, to charge the defendant with default which would deprive him of the exoneration to which upon the grounds above suggested he would be entitled. Proof was given tending to show that it was the duty of the defendant, as between him and Young & Vreeland, to put in the iron pipe which was to conduct the water to the sewer in the street.

All that can properly be meant by this is that Young & Vreeland were not bound to put in the iron pipe, and therefore if the defendant wished to have the water conducted from his cellar to the street, he must provide for it. And it is not obvious that, if the defendant was willing that the water which was to be conducted into his cellar should remain there, Young & Vreeland would have any cause to complain of him if no iron pipe was furnished at all.

But it appeared that the defendant had contracted with one McKensie to put in the iron pipe, and it was claimed that he had improperly delayed his work and the pipe was not there on the night of the accident. It might be suggested that where two or more proper persons exercising their several independent employments are respectively employed to do the work of erecting and completing a building, the improper delay of one furnishes no excuse to another for leaving his own work in a condition dangerous or injurious to third persons, and therefore McKensie's delay was no excuse to Young & Vreeland for the negligence of their servants in leaving the leader in question in the state and condition in which it was.

But a clear, and it seems to us a conclusive, answer to all this suggestion of excuse to Young & Vreeland, is that the neglect to put in the iron pipe into the cellar to carry away the water, could not prevent or hinder Young & Vreeland in the doing of what they had contracted to do, viz.: bring the leader down into the basement. As already stated, if the defendant did not in some manner provide for the removal of the water it might remain there, but that did not concern Young & Vreeland. The defendant had done nothing to interfere with or modify his contract

with them; it was their duty to extend the one leader into the basement, and to conduct the other through the rear wall into the basement or cellar, and with the iron pipe or other means of carrying off the water they had nothing to do. Had they done what they agreed to do, and what alone the defendant authorized them to do, they would have continued the leaders into the basement and the accident could not have happened. We can say and must necessarily say, that the want of an iron pipe in the cellar was not, and as matter of law could not be, a reason for leaving the leader unfinished at a height of fifteen feet outside of the defendant's building, so as to discharge water upon the area and upon the plaintiffs' premises. In order to subject the defendant to liability founded on any omission to see that the iron pipe was introduced, it should be true that the leaders could not be brought down to the basement until the iron pipe was there, which not only is not true but the suggestion is so obviously absurd as not to warrant any doubt on the subject. The proposition is this: because an iron pipe has not been introduced into the cellar to carry off the water, therefore, Young & Vreeland could not extend the leaders down far enough to conduct the water into the cellar. It seems to us that there is not and cannot be any legal or necessary connection between the two things, and it might as well be said that the leader in the rear was left fifteen feet high because the vaults under the front sidewalk were not white-washed.

If the complaint had been that the water was not carried off from the cellar, or that the leader was not properly connected with an iron pipe or other conduit *in the cellar*, there would be some force in the suggestion that the defendant or McKensie was in fault, and that fault caused the accident. But not so: had the leader led down to the basement, the accident could not have happened. So far as the plaintiffs were concerned, all would have been safe. On this point, there is no conflict of evidence.

Being, therefore, wholly unable to see that, upon any legal view of the subject, the omission to introduce an iron pipe into the cellar to carry off the water could possibly have caused the omission to extend the leaders down to the basement so that the water should flow into the cellar; and in the absence of any evidence that the defendant consented, in any manner, that Young

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and Vreeland should not perform their contract so to extend the leaders, or prevented their doing so, or altered or modified his contract with them in any particular; we do not perceive that there was any question to submit to the jury. The accident was caused, and wholly caused, by the neglect of Young and Vreeland, or their servants, to do that for which the possession and control of the building was given to them by the defendant, and do it in a safe and proper manner.

The judgment should be affirmed.

Judgment affirmed.

THE plaintiffs in the foregoing case appealed from the judgment to the Court of Appeals, and the judgment of this Court was reversed. The questions involved are of such general interest, and have so often of late years been the subject of discussion, that it seems advisable to insert the opinion pronounced in that Court, with the statement of the views of the Judges, as furnished by the Reporter.

IN THE COURT OF APPEALS.

GILBERT & TUTTLE	}
v.	
BEACH.	

CLERKE, J. Undoubtedly, whenever injury to the person or property of any one arises from a nuisance in the building or land of another, the owner is responsible for the damage. And this is so, not only where he has demised the property to another with the nuisance upon it and reserved a rent, but where the erection was made by another upon his land, and where he has no right to enter for the purpose of removing it. This was decided in *Bush v. Steinman*, (1 B. & P., 404,) where the owner of a house, who had contracted with a surveyor to put it into repair for a stipulated sum, was held answerable to a third person who had suffered an injury in consequence of the improper act of one of the workmen in making the repairs, although the workman was neither his servant nor under the control of the owner

of the house. It is expressly held, in *The Mayor, &c., of New York v. Bailey et al.*, (2 Denio, 433,) that the owner of real estate is responsible for the negligent acts of persons employed in making erections upon it for his benefit, though the relation of master and servant does not exist between the owner and the person so employed.

The former case, however, has been seriously questioned, if not overruled, in the English Courts; and both, I think, are entirely at variance with the principle adopted by this Court in *Blake v. Ferris*, (1 Seld., 48,) and the cases quoted by the Judge who delivered the opinion of the Court. That principle is, that unless the relation of master and servant exists between the party charged and the person who has done the injury, the act of the latter creates no liability in the other. I cannot conceive that it makes any difference, when the injury happens to have been committed on the premises of a person sought to be charged, if he had no direct agency in the commission of it, or has not sanctioned it in any way. If the person doing the injury is not his servant, but the servant of another, there is no better reason why the latter should be relieved from the responsibility than if the injury was committed in the street. It is the act of a person done in the course of his employment, and he is bound to obey his own master and not the employer of his master: otherwise, if a man, employed by a contractor in erecting a building, carelessly lets a brick fall on the head of a person passing by, the owner of the building is liable, and not the contractor. This, I think, could never be held; and yet it would be the legitimate consequence of the position that a man is answerable for every damage which arises from any injurious act committed on his premises.

But, in the present case, some evidence was introduced at the trial at least tending to show that the defendant himself undertook to furnish the iron pipe to be connected with the tin pipe, and that the accident would not have occurred if it had been furnished in time. It was no excuse for the defendant to say that he had contracted for the iron pipe with McKensie, who delayed the work. McKensie is not answerable to the plaintiffs for this delay; and it was the defendant's duty either to procure one from some one else, or to make some temporary arrangement which would protect the plaintiffs from damage. If he modified the

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contract with Young & Vreeland to this extent, he should not have left it to their foreman to fix the wooden trough, which he did so imperfectly as to cause the injury.

I think, therefore, that the Judge erred at the trial.

COMSTOCK, Ch. J., SELDEN and WRIGHT, Js., (if not others,) dissented from that part of the preceding opinion which denies the liability of the defendant, on the broad ground of his ownership of the premises; but all the Judges concurred that the judgment must be reversed, on the special ground stated by CLERKE, J., in the last paragraph of the preceding opinion.

(Copy.)

E. PESHINE SMITH, *State Reporter.*

JOSEPH AGATE, Plaintiff and Respondent, v. JAMES N. RICHARDS, Defendant and Appellant.

1. Where, in an action on contract for the sale of goods, wares and merchandise, a former recovery upon the same cause of action in a suit between the same parties is set up as a defense; a record of a recovery in a former suit in favor of a plaintiff and against a defendant of the same names, where the complaint in each suit alleges, as the only cause of action stated, the sale of goods, wares and merchandise by the plaintiff to the defendant during periods ending on the same day, and claims the same sum to be due, furnishes *prima facie* evidence of the truth of the defense.
2. Identity of names in connection with the same or the like subject matter is presumptive evidence of identity of person.

(Before HOFFMAN and WOODRUFF, J. J.)

Heard, November 10th; decided, December 10th, 1859.

THIS is an appeal by James N. Richards, the defendant, from a judgment, in favor of Joseph Agate the plaintiff, rendered on a trial had before Mr. Justice PIERREPONT, without a jury, June 27th, 1859.

The summons is dated April 27th, 1858, and states that judgment will be taken for \$72.50, with interest from January 1st, 1858.

The complaint alleges a sale for cash, of goods, wares and merchandise, by the plaintiff to the defendant, between the 23d

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of May, 1855, and the 25th of December, 1856, consisting of "colored linen shirts, silk cravats, suspenders, &c.," of the value of \$72.50; that such sum is due with interest from the 1st of January, 1857, and prays judgment for that sum and such interest, with costs.

The answer avers a former suit in this Court, by the plaintiff against the defendant, for the same cause of action, and a recovery by the plaintiff therein on the 29th of December, 1857, on said cause of action for \$90.43 and that such judgment is in full force.

At the trial, the defendant, to prove such defense, introduced the record of a judgment in this Court, in favor of Joseph Agate as plaintiff against James N. Richards as defendant. The summons in it was dated November 21st, 1857; was served on the 24th of said November, and states that judgment will be taken for \$72.50, with interest from the 1st of January, 1857. The complaint in it, states a sale by plaintiff to defendant of goods and merchandise, consisting "of shirts, hose, suspenders, &c.," between the 9th of November, 1854, and the 24th of December, 1856, of the value of \$122.50; that \$72.50, with interest from January 1st, 1857, is due, and prays judgment for that sum and such interest, with costs. Judgment in it, was perfected, for want of an answer, December 29th, 1857, for amount claimed, . . . \$72 60
Interest, 4 83
Costs, 13 00

Total, \$90 43

The Judge held, that there was not sufficient proof given of the identity of the parties and of the cause of action in the two suits, and gave judgment for the plaintiff for \$85.18, (the amount claimed, with interest;) the defendant excepted to the decision and appealed from the judgment.

C. Bainbridge Smith, for appellant.

I. It appears by the judgment roll in the former action, and the complaint in this, that the causes of action were between the same parties, for the recovery of the same kind of merchandise; that they accrued during the same periods, and that judgments were demanded for the same amounts. This constituted a de-

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fense, and judgment should have been rendered for the defendant. (*Marston v. Lawrence*, 1 Johns. C., 397; *Beals v. Cameron*, 8 How. Pr., 414; *Averill v. Patterson*, 10 id., 85; *Swart v. Borst*, 17 id., 69.)

II. The former judgment was conclusive upon the parties, not only as to the matter actually determined, but as to every other matter which might have been litigated therein. (*Bendernagle v. Cocks*, 19 Wend., 207; *Embury v. Conner*, 3 Comst., 511, 522; *Doty v. Brown*, 4 id., 71; *Sheldon v. Carpenter*, id., 579.)

III. The fact of the names of the plaintiff and defendant being identical in both suits, was *prima facie* evidence that they were the same persons in both actions. (*Hatcher v. Rocheleau*, 18 N. Y. R., 87.)

The judgment should be reversed.

Wm. M. Niles, for respondent.

I. The appellant does not allege any other defense than a prior judgment for the same identical cause of action. We suppose that in a city of eight hundred thousand inhabitants, the mere production of a judgment roll against a defendant of the same name, is not sufficient evidence that it is the same defendant, especially if the name be John Smith.

II. Even if that were not so, the case in judgment is not "identical" in a single particular with that in suit.

One is for sales between May 23d, 1855, and December 25th, 1856; the other is for sales between November 9th, 1854, and December 24th, 1856. One is for colored linen shirts, cravats, &c.; the other is for colored linen shirts, hose, &c. One is for sales to amount of \$72.50; the other for sales to amount of \$122.50. One is alleged to have been sold for cash; the other is not alleged to have matured before January 1st, 1857.

One claims judgment for \$72.50. The answer sets up a judgment for \$90.43, and no attempt to identify parties, goods, times or anything else, except by throwing up to the judge a paper purporting to be a judgment roll, and asking him to deprive the plaintiff of a claim sworn to as now existing, and admitted by defendant.

III. The "answer is controverted as upon a direct denial." That is, we deny that any judgment was recovered against this

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defendant, and we deny that any judgment of this Court is for this identical cause of action. (Code, § 168.) Both then must be proved by the defendant, (1 Phil. on Ev., 2 ed., p. 6,) and the papers prove nothing on either of those points. Besides, the judgment roll produced is a mere nullity on its face. It does not show any appearance by defendant, and does not show a service within the jurisdiction. Perhaps the summons was handed to Richards in Australia, and then, he not appearing, the Court had no jurisdiction. (Code, §§ 33, 138.) And lastly, if all this were not so, the judgment is not properly pleaded. Defendant alleges a public record on information and belief.

The judgment should therefore be affirmed.

BY THE COURT—HOFFMAN, J. The defendant set up in his answer a former judgment recovered against him for the same demand by the same plaintiff. The whole question is as to the identity of person, and cause of action.

The parties, plaintiff and defendant, have the same names in each suit, and not names of very ordinary occurrence. The complaint in the first action asks for judgment in the sum of \$72.50, with interest from the 1st of January, 1857. The complaint in the second action is in this respect the same. The summons in each action is, in this particular, also alike.

The complaint in the present suit states sales of linen shirts, silk cravats, suspenders, &c., between the 23d of May, 1855, and the 25th of December, 1856. The complaint, in the former action, states sales between the 9th of November, 1854, and the 24th of December, 1856, of shirts, hose, suspenders, &c., to the amount of \$122.50, and then avers that the defendant remains indebted to the plaintiff in the sum of \$72.50, with interest from the 1st January, 1857, on account of said goods and merchandise.

We think that there was enough presented to raise a presumption of identity and support the answer. The plaintiff should have been driven to repel this presumption. (18 N. Y. R., 89.)

Judgment reversed, new trial ordered, costs to abide event.

Kinsman v. The New York Mutual Insurance Company.

JOHN KINSMAN, Plaintiff and Respondent, v. THE NEW YORK
MUTUAL INSURANCE COMPANY, Defendants and Appellants.

1. Although a plaintiff establishes by his evidence a *prima facie* cause of action, so that when he rests his case a refusal to order a nonsuit is proper, yet if the evidence on the part of the defendant is very greatly preponderating, and especially where that preponderance arises from facts and circumstances not controverted, the Court will set aside a verdict for the plaintiff as against evidence.
2. The fact that a vessel, after very slight repairs, does actually perform many voyages, and with repairs greatly less than would justify her sale and an abandonment to an insurer, does actually continue in service for many years, being pronounced seaworthy and capable of performing voyages to any part of the world, greatly outweighs the opinion of her master, and surveyors, making an examination by his request, that repairs are necessary, exceeding half her value; and this is especially true when, after such sale and abandonment, the cause of the leakage, ascribed by such surveyors to injury by perils of the sea, is found to be two auger holes bored in her side which may be stopped at a trifling expense.
3. Where freight is insured and the ship is disabled after her service is in part performed, it is the duty of the master to earn freight if he can, by forwarding the cargo by another vessel, and where, in such case, he voluntarily gave up the cargo to its owners, and they sent it on by another vessel, a finding that there was no evidence that he could have earned freight, (in the absence of any proof of the cost of the shipment by such other vessel,) cannot be sustained. The service having been in part performed, it is to be presumed that freight is earned, unless the plaintiff proves that the cost of forwarding exceeded the freight payable by the owner.
4. Where the service has been in part performed, and the owner voluntarily accepts the goods, freight *pro rata itineris* is earned, and may be demanded.
5. Where a charter-party stipulated on the part of the charterers, that the master should be supplied by them with a sum not exceeding one-third of the freight "free of interest and commission, which is to be in part payment of the freight at the exchange of twelve per cent premium, together with the cost of insurance on such advance," and by further provisions any other advances they thought fit to make on the credit of the freight should, with premium, interest, commission and insurance, be considered in part payment of freight. Advances made under the first stipulation, where the voyage is in part performed, are at the risk of the charterers, voluntarily placed by them at the hazard of the voyage, and are to be deemed freight earned, and not liable to be refunded, though the vessel is afterwards lost.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 17th; decided, December 10th, 1859.

ACTION to recover for a total loss upon two policies of insurance, one for \$4,000 on the ship, and one for \$4,000 on the freight of the "Ozark."

In September, 1852, the ship Ozark, of three hundred and ninety-eight tons, being in New York, bound for San Francisco, a charter-party was entered into by her master with Barrera & Brother, as agents for the Peruvian Government, that she should go to Callao from San Francisco, and being tight, strong, and every way fitted for the voyage, should proceed to the Chincha Islands and take in a full cargo of guano, return for her final clearance to Callao, and proceed to Hampton Roads to receive orders from Barrera & Brother, to discharge in any safe port not north of Cape Ann, nor south of Hampton Roads; freight to be paid \$15 per ton; "the master to be supplied at Callao with a sum not exceeding one-third of the freight which was to be in part payment of freight, at the exchange of twelve per cent premium, together with the cost of insurance on such advance, and to be free of interest and commission;" * * * "and should the charterers think fit to advance any further sum on the credit of the freight for repairs, stores and disbursements, such sums, with premium, interest, commission and insurance, to be considered in part payment of freight," another third to be paid in cash on arrival at the port of discharge, and the balance to be paid on the delivery of the cargo.

The ship sailed from New York in December, 1852, and arrived at San Francisco in November, 1853.

In November, 1853, the plaintiff insured at the office of the defendants, \$4,000 on the vessel, valued at \$16,000, and \$4,000 on her freight, valued at \$9,000, at and from San Francisco to Chincha Islands, and at and from thence to an Atlantic port in the United States, touching at Hampton Roads for orders. Loss, if any, payable to him or order.

In December, 1853, she sailed from San Francisco for Callao, where she arrived in February, 1854, and proceeded from thence in the same month to the Chincha Islands, and there took in a cargo of guano, and returned to Callao in April, 1854.

In pursuance of the stipulation in the charter-party, the charterers (Barrera & Brother) advanced to the Captain upwards of \$4,000 in part payment of freight.

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On the 28th April, 1854, she sailed from Callao with her cargo, bound for Hampton Roads: on the 9th of May following she had returned and anchored again in Callao, and the Captain's protest was noted, stating "that, having sprung a leak at sea, he put back for the benefit of all concerned."

On the 10th May a survey was had by two shipmasters and a shipwright, and they reported that they found the ship in a sinking condition, and advised that the cargo be discharged.

On the 5th of June a second survey was had by two shipmasters, (one of whom made the first survey,) and the same shipwright, and they recommended extensive repairs. The same shipwright then estimated the cost of the repairs, which were so recommended, to be \$15,130.50.

The Captain stated in his testimony that he had no funds with which to make the repairs; that the owners had no agents in Callao; that he went to several persons to borrow money to make the repairs, and could get none; that he advertised for funds on bottomry, and offered as security the ship's cargo and freight, and could not obtain funds in any way.

The Captain thereupon gave up a portion of the cargo of guano to Barreda & Brother, and they sent it on by the ship Parana.

And the Captain then advertised the ship for sale at auction, and, as he testified, the surveyors and the United States Consul concurred in advising the sale. On the 20th of June she was sold at auction to Captain James Pederson for the sum of \$8,100—producing, after deducting the expenses of sale, the net sum of \$7,579.96.

Barreda & Brother then demanded of the Captain the amount of their advances above mentioned, "on the ground that the voyage was not completed;" and the Captain repaid it to them out of the proceeds of the sale of the ship.

On the 26th of July the plaintiff, having been advised of the sale, and claiming that the ship had sustained so great damage on her attempted passage home that she could not be repaired without an expenditure not justified by her value, abandoned both vessel and freight to the underwriters.

The action was tried on the 3d day of June, 1857, before Mr. Justice SLOSSON and a jury, and on the trial the defendants moved for a nonsuit, which was denied, and the defendants excepted.

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A verdict was rendered for the plaintiff for the whole sum insured on both policies, (i. e., on vessel and on freight,) as for a total loss.

And, by direction of the Presiding Justice, the jury also found specially upon numerous questions submitted to them. The findings material to state here were: That the vessel was seaworthy when she left San Francisco, and also when she left Callao with her cargo; that her subsequent leakage was caused by a peril of the sea of an extraordinary character; that the necessary expense of repairing her at Callao would have been \$13,000, and the expense of raising the funds twenty per cent, or \$2,600; that there was a necessity to sell the vessel, arising from the inability of the Captain to raise funds at Callao for the repairs; that her detention at Callao, while waiting for funds from home to make the repairs, would have materially injured both vessel and cargo; that one-half the cargo was so damaged as to be unfit for reshipment; that, from any evidence submitted to the jury, the Captain could not have sent the residue of the cargo to the United States by any vessel, the use of which he could procure at Callao; and that no freight was earned before the sale of the vessel.

The opinion of the Court recites a considerable portion of the evidence, in connection with the reasons given for regarding the verdict as against evidence, and it also mentions requests for special instructions, and portions of the charge; and it is not necessary here to repeat them. Exceptions were taken on the trial which raise the questions of law considered by the Court; and the other exceptions to the admissibility of evidence, &c., which were taken on the trial, were waived on the argument.

On the coming in of the verdict, the Judge directed that the exceptions be heard in the first instance at the General Term, and that the judgment be in the meantime suspended, but with leave also to the defendants to first move at Special Term for a new trial on a case to be made. The motion for a new trial was made and denied, and the defendants appealed.

That appeal, and the exceptions so ordered to be heard at Special Term, were thereupon brought on together and argued.

J. M. Van Cott, for plaintiff.

I. The facts specially found are according to the evidence, and the loss of the ship was, constructively, total.

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1. The damage was caused by a peril of the sea.
2. The cost of repairs, (deducting one-third new for old,) greatly exceeded half her value.
3. There was an absolute inability to procure funds to make the repairs.

4. The sale of the ship was justified by its necessity.

5. No freight was, or could be, earned. The advance by the charterers on account of freight was, therefore, subject to repayment.

The loss of freight was, therefore, actually total. (*Am. Ins. Co. v. Center*, 4 Wend., 45; *Ogden v. The Gen. Mut. Ins. Co.*, 2 Duer, 204; *Ruckman v. Merch. Louisville Ins. Co.*, 5 id., 342.)

II. The refusal to nonsuit, and the submission of the questions, whether the ship was seaworthy and was damaged by a peril of the sea, were not erroneous.

All damages at sea are to be deemed caused by "perils of the seas," when not appearing to result from the inherent weakness of the ship. (*Sherwood v. Ruggles*, 2 Sandf. S. C. R., 55; *Bullard v. The Roger Williams Ins. Co.*, 1 Curtis C. C. R., 148, 155; *Potter v. Suffolk Ins. Co.*, 2 Sumn., 197; *Patrick v. Hallett*, 1 J. R., 241; *Talcot v. Com. Ins. Co.*, 2 id., 129.)

A loss by perils of the sea was abundantly proved

R. S. Emmet, for defendants, (passing over some points, argued, among others, the following:)

I. The findings of the jury upon the first question, viz., whether the vessel was seaworthy when she left San Francisco; upon the second question, viz., whether she was seaworthy when she left Callao; and upon the fourth question, viz., whether the subsequent leakage was caused by a peril of the sea of an extraordinary character; are against law and evidence.

1. If, the ship being unseaworthy at Callao, the master neglected to have her repaired, and the subsequent damage was the direct consequence of such unseaworthiness, the warranty was not satisfied, and the underwriters are discharged. (*Phillips on Ins.*, §§ 700, 731; *Arnould on Ins.*, §§ 669, 677; *Kent Com.*, 5th ed., § 288; *Am. Ins. Co. v. Ogden*, 20 Wend., 287; *Copeland v. N. E. Ins. Co.*, 2 Metc., 432; *Starbuck v. N. E. Ins. Co.*, 19 Pick., 198; *Heyward v. Ins. Co.*, 1 Sumn., 218; 2 Metc., 432; 4 *Mason*, 441; *Warren v. U. S. Ins. Co.*, 2 Johns. Ca., 231.)

2. The ship was unseaworthy when she left Callao, and the damage complained of was the direct consequence of such unseaworthiness.

(a.) She became leaky within two days after sailing without having encountered any peril other than strong breezes and cloudy weather, and the wind at no time prevented her carrying all sail. The presumption is, therefore, that she was unseaworthy. (*Watson v. Clerk*, 1 Dow., 344; *Packer v. Potts*, 3 id., 23; *Douglas v. Scougal*, 4 id., 269; 1 Arnould, 689; Phil., 725; Park., 342, 469; *Talcot v. Com. Ins. Co.*, 2 J. R., 124; *Puddock v. Franklin Ins. Co.*, 11 Pick., 227.)

(b.) The auger-holes subsequently discovered in her side were a sufficient cause for her leakiness, and rendered her unseaworthy.

II. The finding of the jury, that the necessary repairs would have cost \$13,000, is against evidence.

1. If all the repairs mentioned in the estimate were necessary to make the ship navigable, it is conclusive evidence, in view of the slight perils to which she was exposed, that she was unseaworthy when she left Callao.

2. The ship was actually repaired for less than \$1,000, so as to render her navigable and seaworthy, and in better condition for all purposes than she was in before sailing from Callao.

III. The inability of the master to procure funds for repairs did not justify the sale of the vessel, as found by the jury in answer to the tenth question.

1. Such inability arose from the neglect of the owner to provide the master with the means of raising funds to meet such exigency. Callao was a port of destination contemplated by the policy, and the owner was bound to make the necessary provisions for funds at that port. (*Am. Ins. Co. v. Ogden*, 20 Wend., 287; *Ruckman v. Merch. Louisville Ins. Co.*, 5 Duer, 342.)

2. For anything that appears from the evidence, the master might have communicated with the owner at home without the vessel or cargo suffering injury from detention. (*S. C.*)

IV. The finding of the jury upon the nineteenth question, viz., that no freight was earned, is against evidence. The vessel was chartered to Barreda Bros. By the charter-party, part of the freight was payable in advance, and was paid. After the

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vessel returned to Callao, in a damaged condition, the advance payment was voluntarily repaid to the charterers.

1. It is well settled that, where freight is paid in advance, in pursuance of the contract of affreightment, and the vessel is lost by a peril of the sea before the whole freight is earned, the payment in advance cannot be recovered back, unless the contract expressly provides for its repayment. (*Abb. on Ship., Sto. & Perk. Notes*, 528; *De Silvale v. Kendall*, 4 M. & S., 37; *Manfield v. Mailland*, 4 Barn. & Ald., 585; *Watson v. Duykink*, 3 John., 335.)

That the payment here was to be by way of freight is expressly provided in the charter-party, and is proved by the fact that the money so paid was to be free of interest and commission, as distinguished from money advanced by way of loan. The charter-party does provide for other payments which were to be made by way of loan, and to bear interest and commission. (*De Silvale v. Kendall*, *supra*.)

The charter-party does not provide for repayment in case of loss of vessel. (*S. C.*, opinion of BAYLEY, J.)

2. If freight was not earned, it was because the vessel was unseaworthy: the finding of the jury can only be supported on that ground.

3. It was the duty of the master to have procured another vessel at Callao to carry on the cargo, and the burden of proving that a vessel could not be obtained is upon the owner. (*Schieffelin v. N. Y. Ins. Co.*, 9 John., 21.)

V. In any aspect of the case, assuming the vessel to have been seaworthy, the plaintiff was only entitled to a verdict for a partial loss for such damage as was proved to be the immediate consequence of the perils insured against. The vessel might have been repaired, so as to enable her to transport her cargo. The plaintiff was bound so to repair her, or to procure another vessel: having neglected to do so, the defendants are not liable for the loss of any part of the freight.

BY THE COURT—WOODRUFF, J. On the trial of this action various exceptions were taken by the defendants to the rulings of the Court, admitting and rejecting evidence, but on the hearing before us the defendants' counsel disavowed any intention to insist upon any of those exceptions.

And although he placed upon his printed points the suggestion that the Judge erred in charging the jury that "the fact that the vessel sprung a leak so soon after leaving the harbor of Callao, did not raise a presumption that she was unseaworthy when she left," yet as no exception was taken on the trial to this part of the charge, this point he also passed over on the argument.

Indeed, the express finding that the leakage which rendered it necessary for the vessel to return to Callao was caused by a peril of the sea of an extraordinary character, and the evidence tending to prove that fact, if they do not justify the charge in this particular, probably render it of no importance.

If it had appeared clearly that after the vessel left Callao she encountered no storm nor other extraordinary peril which could be reasonably deemed sufficient to cause the leak, then there would have been a presumption that the vessel was unseaworthy when she sailed. (*Van Valkenburgh v. The Astor Mut. Ins. Co.*, 1 Bosw., 62.)

The proposition as stated in the charge was obviously given in view of the testimony of the Captain, that he encountered heavy seas, very hard, stiff breezes for two or three days, and wind heavy enough to carry away her main top-gallant sails.

As no qualification of the proposition was asked by the defendants' counsel, and no exception was taken thereto, we do not think it necessary to consider it further.

The arguments addressed to us were that the findings of the jury are against the law and the evidence, both as to the cause of the loss and its extent.

The vessel left Callao on the 26th of April, 1855, on her voyage around Cape Horn, having a cargo of guano on board. She returned to Callao on the 9th of May following, and (as alleged by the plaintiff) in a sinking condition.

1. The first great question was whether she was seaworthy when she sailed from Callao. That question was fairly submitted to the jury upon the evidence, to which there was no contradiction in terms, and the jury found that she was seaworthy.

The testimony of the Captain to the fact of seaworthiness, and to the perils which he encountered, made out, we think, a *prima facie* case for the plaintiff both in respect to the seaworthiness of the vessel at the time of her departure, and in respect to actual injury by the causes already above mentioned.

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We do not think that a very strong or convincing case was made out in these respects, but it was quite sufficient to render it proper to submit these questions to the jury.

So in regard to the other important questions; what was the extent of the damage, and what would it have cost to repair the vessel?

Under the direction of the United States Consul, two successive surveys were had by shipmasters and a shipwright. These surveys and the estimate made by the shipwright of the cost of repairing the vessel were not only read in evidence by the plaintiff without objection from the defendant, but the Captain by his testimony on the trial affirmed their correctness.

If these surveys and estimate were correct in fact, then the finding of the jury that the vessel was so injured that the cost of repairs after deducting "one-third new for old" would have exceeded half her value, was also correct. We cannot say that these proofs in connection with the protest (read in like manner on the trial) did not *prima facie* establish the facts so found.

So that upon the plaintiff's case as thus *prima facie* established, if there was no contradiction there could be no reasonable claim that the verdict was not warranted by the proofs.

And it is proper to observe here that upon the findings of the jury on these points it became entirely unnecessary to consider the point raised on the argument, whether the jury were warranted in finding the amount which it would cost to unload and reload the cargo, for if the loss was constructively total that finding is wholly immaterial.

So also it becomes unnecessary to consider the question also discussed in the defendants' points whether the inability of the master to procure funds for repairs justified the sale of the vessel. It being found that the cost of repairs, after the proper deduction, would have exceeded a moiety of her value, the loss was constructively total, and if those findings can be sustained her abandonment was justified, whether funds could or could not have been procured with which to make the repairs.

The question therefore recurs, whether we can say that the findings of the jury that the vessel was seaworthy when she sailed from Callao, and that she was injured by extraordinary

perils to an extent amounting to a constructive total loss are against evidence.

As already said, these facts were *prima facie* proved, and although we cannot say that the plaintiff's proofs are quite satisfactory to our own minds, still the jury might conscientiously and sincerely credit the evidence, and we incline to the opinion that in the absence of contradiction they were bound to give it credit.

The Court, therefore, properly refused to grant the motion for a nonsuit.

We are, however, constrained to say that not only is very great doubt of the correctness of the verdict created by the evidence given on the part of the defendants, but the preponderance of the evidence is greatly against the verdict.

James Pederson was examined by the defendants. He was in no wise impeached, and his testimony seems to us, (by establishing facts which clearly outweigh the opinion of the plaintiff's witnesses,) to prove that the ship had not sustained any such damage by the perils of the sea as is claimed by the plaintiff, and that no such amount of repairs was necessary to make the ship in all respects seaworthy and capable of taking her cargo of guano to the port of destination.

According to his testimony, he was in Callao about the 1st of June, 1854, three weeks before the ship was sold. His business there was the purchase of a vessel. He examined the ship a number of times before the sale, with a view to becoming the purchaser. Sometimes he was on board alone, and sometimes he took with him friends. His object was to ascertain the condition of the vessel, and he made the examination "as full as could be made by anybody." He found her in such condition that he determined to buy her, and he did purchase her at the sale for the sum of \$8,100.

After his purchase he again examined her, assisted by two ship carpenters, (one of them being the same who had united in the previous survey above referred to, Mr. A. J. Shute.) The result of Pederson's repeated examinations, as stated by him, are in direct and irreconcilable conflict with the testimony of the plaintiff's captain and the surveys he caused to be made, as to the extent of the injuries to the ship and the necessity of repairs.

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He then had the ship repaired, and had everything done which he considered necessary to make her seaworthy, and the whole expense was only \$958.06; and it is to be observed that the witness giving this testimony is a ship master and ship owner, who has commanded a vessel for twenty-one years and has been a mariner for thirty-four years, and he cannot be conceived to have had any interest or motive to testify untruly in this matter. His conduct in actually making the purchase, and his subsequent use of the vessel confirm his testimony.

Having completed these repairs, he also caused a survey to be made, by requesting the agents of Lloyd's to have it done, and those agents appointed three English ship captains, then in port, to make the survey, which they did on the 7th of July, and they declared that she made no water while they were on board, (though she had about 400 tons of guano still remaining on board;) that she appeared a sound, well fastened, efficient ship, newly caulked, well found in boats and sails, and every material of all kinds; and they add that they think her capable of taking a cargo of guano to any part of the world.

There is nothing in the case to justify a belief that this survey was not made and certified with impartiality and truthfulness.

Pederson then took the command of the vessel, she still having a part of her original cargo of guano on board. He took in about 250 tons more, and sailed to Costa Rica, thence to Paita in Peru; there filled up the ship with cotton on the top of the guano, and sailed thence to San Blas in Mexico, where he landed the cotton in perfect order, and on the 17th of December, 1854, sailed thence for China with the guano, reached Hong Kong March 3d, 1855, and thence to Whampoa, where he landed the guano, and although at least 150 tons of the guano was the same which was on board when the ship is said by the plaintiff's witness to have leaked so that there was ten feet of water in her pumps, and the same which he testified was so wet that it was good for nothing when he gave up the other portion to the charterers, Barreda & Brothers; yet Pederson testifies that the guano was delivered at Whampoa in good order, with the exception of 25 or 30 tons, which was partially damaged. At Whampoa he had the vessel put on the dry dock, and made a thorough exami-

nation ; had her stripped of all her copper, caulked and recoppered, and afterwards the seams and the whole sides of the vessel, from the copper to the covering board, scraped white, and found the vessel sound, with the exception of one plank that was a little injured by worms. She was repaired under the inspection of Lloyd's agents, and his expenses, including some new sails, were about \$4,500. With a cargo of 500 tons and 200 Chinamen he returned to California and delivered his cargo in good order. The vessel has been in good condition ever since, and has been in service ever since ; and on the voyages so testified to, no unusual leakage occurred, except perhaps some which was caused by a small auger hole, which will be presently mentioned.

This history is wholly inconsistent with the plaintiff's case, incredible if that case is proved, and seems to require some explanation of the error into which the surveyors, appointed by the United States Consul before the sale, must have fallen if the testimony of Captain Pederson is believed.

That explanation is found in the fact that there were two auger holes bored through the sides of the ship, one of a diameter of one and one-half inches, and the other of one-half or three-quarters of an inch, (the latter partially stopped at one time with paint or putty, and the former partially stopped with a slack plug,) and having the appearance of having been bored from the inside of the ship, and so near the water line that when the ship was loaded they were some four feet under water.

The first of these holes Captain Pederson discovered before he purchased the ship, and it being repaired, no considerable leakage occurred afterwards, except from the small hole, which he found on his voyage to China or after he arrived.

The existence of these holes, together with another which had been bored near one of them, but not through the side, was very strong evidence that at some time they were voluntarily made in order to admit water, and probably with a view to sink the ship.

No evidence was given showing when these holes were made. If they were fraudulently made after the ship sailed from Callao for the United States, that might not have defeated the Policy which covered barratry of the master and mariners ; and if made before, it may not have established such negligence in not dis-

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covering and repairing the injury as would defeat the Policy. But the testimony does tend very strongly to show that the leakage on that voyage did not arise from the causes assigned, and that the repairs necessary to make the ship seaworthy were not at all such as were estimated before the sale.

The existence of these holes seems to us, in connection with Pederson's uncontradicted and unimpeached testimony, to explain and in a great degree remove from the surveys made by the surveyors appointed at the instance of the captain, the force and effect which might otherwise be claimed for them. Those surveyors finding that the water had actually entered the ship, and not discovering these holes, could not easily avoid the conclusion that the leakage was caused by the straining of the vessel and opening of her seams, which of course they imputed to the action of the wind and waves. It is not, therefore, any imputation upon their integrity to say that they were mistaken. And the like suggestions may explain the testimony of the captain, in the absence of evidence that he acted fraudulently.

The facts stand prominently before us that the ship was repaired for comparatively a small sum; that she was pronounced seaworthy for the carriage of guano to any part of the world; that she made three voyages with nearly as much guano on board as she had when she put back to Callao; and she is still in good condition, and all repairs since those voyages, added to those made at Callao, have cost far less than the amount required to justify her abandonment. True, she has not been around Cape Horn; but it is also true that, at the time she put back to Callao, she had only been a few days on her voyage in that direction, and the evidence of violence from wind or waves is very slight.

We think that we ought not to be, and consistently with just regard to the rights of the parties cannot be, satisfied with the verdict in this respect.

2. In relation to the freight, however, the verdict is even less satisfactory, for notwithstanding it be found that there was a constructive total loss of the ship, it was the duty of the master to earn freight if he could by forwarding the cargo by another vessel. (*American Ins. Co. v. Center*, 4 Wend., 45; *Schieffelin v. New York Ins. Co.*, 9 J. R., 21.)

His service had been in part performed: the vessel had been from San Francisco to the Islands, and had taken her cargo of guano on board at the expense of the ship owner, and returned to Callao for her final clearance. This service cannot be regarded as entirely without value if a vessel could there be found to take the cargo forward. There the Captain voluntarily gave up what he deemed the dry part of the cargo to the charterers, (Barreda & Brother,) and they sent it on by the Parana.

These facts are uncontradicted; they are proved by the plaintiff's witness, the Captain himself; and yet the jury have found that, "from any evidence submitted to them, the Master could not have sent that part of the cargo to the United States by any vessel, the use of which he could have procured at Callao."

And in consequence of that finding they have omitted to answer the questions, what would have been the expense of transshipment, and whether any freight would have been earned thereby, and whether the extra expense would have exceeded the moiety of the freight?

We do not find in the case any evidence showing what the expense would have been, nor what it would have cost if the Captain had forwarded the guano himself.

But the finding that no vessel could be procured is in palpable conflict with the fact that a vessel was procured, and the Captain voluntarily gave up the guano to the freighters, and they sent it on.

What has already been detailed respecting the subsequent history of the residue of the cargo, and that it was in fact taken to China, and there delivered in good order, excepting from 25 to 30 tons, bears also on this same question of duty on the part of the Captain to procure another vessel and send that also.

To this is to be added that the burden of proof that no other vessel could be had, is held in *Schieffelin v. New York Insurance Company* to be on the plaintiff, and that to entitle himself to recover on the ground of the loss of the voyage, he must show that another vessel could not be obtained. (3 Kent Com., 210, 213; 2 Arn. on Ins., § 347, pp. 1139-1144; *Shipton v. Thornton*, 9 Ad. & El., 314.)

We cannot, it is true, say that, had the cargo been forwarded by another vessel, the loss of freight would not have exceeded a

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moiety thereof, or that abandonment within the case of the *American Insurance Company v. Center*, (above cited,) would not have been justified. But the verdict of the jury is palpably wrong upon the main fact, that no vessel could be procured; or if its somewhat ambiguous language be taken to import only that no evidence had been given that a vessel could be procured, then the plaintiff failed in establishing this main fact, and no means are supplied of determining whether the loss was or was not constructively total. It may be very probable that it would have cost nearly as much to send the guano by another vessel as the plaintiff would have received, but that is not proved.

Besides, when the owners of the cargo accepted the undamaged portion of the cargo at Callao, the Master might have required the payment of freight *pro rata itineris*, if their acceptance was voluntary; and if they took it because the Master declined to take it forward, or to send it on by another vessel, then also it was the fault of the Master, and does not entitle the owners to say that no freight was earned as between them and the defendants. (2 Bosw., 195; 2 Duer, 204.) It cannot be that nothing was earned which would have been properly assigned by way of apportionment to the service rendered in going to the Islands and lading the guano, and bringing it to Callao. How much was so earned the Court cannot say, but the finding of the jury that no freight was earned, if it imports that this service was of no value or formed no aliquot part of the whole service which the plaintiff was to perform for the freight stipulated, was not warranted by the evidence. As the case stands, it seems to us that only a partial loss of freight was proved, and that enough is not shown to determine its extent or amount.

The finding of the jury that no freight was earned, is also in conflict with one of the instructions given by the Judge at the trial upon admitted facts.

The charter-party, after providing that the vessel should go from San Francisco, in California, to the Chincha Islands, and there load at the ship's expense—carrying any specie necessary to pay for the guano—any tools and bags for dunnage, free of freight, and deliver water required at guano ports free of charge; the crew to sew up the mouths of the sacks, and the owners of the vessel to pay all port charges, and that the vessel

should return, when all this was done, to Callao for final clearance for the United States; and after, also, stipulating that the freight to be paid shall be \$15 per ton, then proceeds:

"The Master to be supplied at Callao with a sum not exceeding one-third of the freight, *free of interest and commission*, which is to be in *part payment* of the freight, at the exchange of twelve per cent premium, together with the *cost of insurance* on such advance. And should the charterers or their agents think fit to advance any further sum on the credit of the freight for repairs, stores and disbursements, such sums, with premium, interest, commission and insurance, to be considered in part payment of freight."

In pursuance of these provisions, the Master received from the charterers over \$4,000. Whether this was equal to or exceeded the one-third of the freight above firstly mentioned, we have no data by which to determine. Out of the proceeds of the sale of the vessel the Master repaid this sum, on the claim of Barreda & Brother that, as the voyage was broken up, they were entitled to have it repaid as freight not earned.

On the trial, the Judge charged that the defendants would be entitled to have deducted from the amount of loss on freight "a ratable proportion of the value made by Barreda & Brother to the Captain, as so much freight earned by way of salvage." This language, though not very clear, we suppose imports that the sum of \$4,000 so received was to be regarded as freight earned, and that the Captain had no right to refund it, and the charterers were not entitled to have it repaid.

This ruling is in conformity with the decision in *De Silvale v. Kendall*, (4 M. & S., 37,) in which the provision for part payment of the freight before the voyage was completed, was singularly like the present. If there is any difference, the present case is even stronger; for here, by charging the plaintiff with the premium of insurance, the charterers have, in the most decisive manner, indicated an intent to pay the freight to that extent absolutely, place that amount at the risk of the voyage, and so acquire an insurable interest therein. And every other reason assigned in *De Silvale v. Kendall* applies with equal force in this case. To the extent of one-third of the freight, the charterers were bound to regard it as a payment. They were neither to charge

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interest nor commissions thereon. Whether an advance under the further clause beyond one-third would stand on a different footing, it is not necessary to say. That is called an advance on the credit of the freight, and is to be allowed, both interest and commissions—in that respect having more the appearance of a loan to the owners.

It is not, in strictness, a payment in advance of the whole service to be rendered, in which nothing has been done by the ship-owner that entitles him to be regarded as meritorious. Although freight is not regularly payable till the cargo is delivered, no rule of law forbids that the parties should stipulate to pay at successive stages of the voyage as the service is in part performed, and so each become sharer in the subsequent risk of the final completion of the voyage.

Indeed, under special terms used in the contract, a payment in advance has been held to be in consideration that the goods were received on board, and so not to be recoverable back, though the voyage was broken up.

Here, for aught that we can say, the service performed by the plaintiff, down to the time the ship left Callao, was justly equal to the sum advanced. The payment then made was, according to the contract, to be payment, and not a loan; and the contract fairly imports that, to that extent, the risk of loss of freight was assumed by the charterers from that time. (See, on this subject, *Andrew v. Moorhouse*, 5 Taunt., 435; *Saunders v. Drew*, 3 Barn. & Ad., 445; *Winter v. Haldimand*, 2 id., 649; *Manfield v. Maitland*, 4 Barn & Ald., 582; *Watson v. Duykinck*, 3 J. R., 335; *Phelps v. Williamson*, 5 Sandf., 578; *Ogden v. The Gen. Mut. Ins. Co.*, 2 Duer, 204.)

It is true that the jury have not attempted to find the amount to be recovered; but they have disregarded the instructions of the Court, and, in answer to a question which assumes that the advance by the charterers must be taken as payment on account of freight, have, nevertheless, found that no freight was earned.

The amount to be recovered, the Judge reserved for adjustment; but, without disregarding this finding, no allowance could be made for the freight so received.

Indeed, the whole verdict proceeds upon the idea of a total loss of both vessel and freight; and the necessary details to render

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an adjustment of the amount due on the policy on freight treated as a partial loss are not ascertained. And without some proof of the cost of forwarding the cargo by another vessel, they cannot be ascertained.

We think a new trial is necessary to the proper determination of the rights of the parties.

New trial ordered, costs to abide the event.

MCCULLOUGH, Plaintiff and Appellant, v. COLBY *et al.*, Defendants and Respondents.

1. It is essential to the right of plaintiffs in a judgment to maintain an action to set aside a deed of real estate made by the defendant in such judgment, as having been made with intent to defraud creditors, that an execution should have been issued on such judgment to the Sheriff before suit brought.
2. Unless the complaint avers the fact of issuing such execution, it will not state facts sufficient to constitute a cause of action.
3. Although such an execution be issued after suit brought, that fact cannot be made a part of the plaintiff's case, either by amendment of his complaint or by supplemental complaint.

(Before HOFFMAN, SLOSSON and WOODRUFF, J. J.)

Heard, November 9; decided, December 10, 1859.

THIS is an appeal by Charles H. McCullough, the plaintiff, from a judgment dismissing his complaint. The action was tried before Mr. Justice HOFFMAN, without a jury, on the 21st of June, 1859.

The action was brought against John L. Colby and Mary Ann Colby, to set aside a conveyance from the former to the latter, as fraudulent and void as against the plaintiffs, who were judgment creditors of John L. Colby. Other persons, holding mortgages on the property, so conveyed, were made parties, but no personal claim was made against them, and no question arises in respect to them.

The Judge's conclusions of fact and of law are as follows:

"1. That the action was brought to set aside a conveyance of real estate made by the defendant, John L. Colby, to the defendant, Mary Ann Colby.

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"2. The plaintiff recovered judgment against the said John L. Colby, on the 27th day of March, 1857.

"3. The defendant, John L. Colby, was served with a summons in this action on the 4th of April, 1857. The defendant, Mary Ann Colby, was served with a summons out of the State on the 6th of May, 1857, and on the 23d of May she voluntarily appeared and answered. An order had been made on the 8th of April, 1857, for commencing the suit by publication as against her; but no publication was made under the same.

"4. An execution upon the judgment in favor of the plaintiff was issued on the 11th of April, 1857.

"The complaint, as served, not stating the issuing of an execution on the judgment, and such fact not being admissible to be put upon the record in the case, I find, as a conclusion of law, that the complaint does not state facts sufficient to constitute a cause of action, and order judgment dismissing the same."

The plaintiff excepted to the decision, and from the judgment entered thereon the present appeal is taken.

F. H. Upton, for plaintiff, (appellant.)

I. This action is not, in any sense, a creditor's bill; it is an action by a judgment creditor for the removal of a fraudulent obstruction to the satisfaction of his judgment, out of specific real estate of the debtor; and in such an action it is not necessary to aver the issuing of an execution upon the judgment, because the issuing of an execution is not an essential preliminary to its commencement.

The case in 5th Sandford stands alone, in apparent conflict with this position. In a review of that decision it will be found that all the authorities, precedent and subsequent, concur in establishing the following general principles:

1. When a judgment creditor files his bill to set aside a fraudulent transfer of personalty, he must aver the issuing of an execution upon his judgment, because he can obtain a lien upon the personalty of his debtor only by virtue of his execution in the sheriff's hands.

2. When a judgment creditor files his bill to reach the choses in action of his debtor, or property not susceptible of being levied

upon, he must aver the issue and return of an execution unsatisfied, because upon such property he can only acquire a lien by filing his bill after the issue and return of an execution; and

3. When a judgment creditor seeks only to set aside a fraudulent conveyance of real estate, he need not aver the issuing of an execution, because his lien is perfect by the docketing of his judgment, and the action is brought to remove a fraudulent obstruction to its enforcement.

II. The case in 5th Sandford was that of a bill filed not only to set aside fraudulent conveyances of real estate, but also of personal property, and to reach choses in action. It was, and by the Court was declared to be, analogous to the judgment creditor's bill, strictly so called. It follows that the only portion of that decision which can be regarded in any sense as authoritative, is that which is applicable to the case then before the Court, namely, to a bill "analogous to a judgment creditor's bill, strictly so called." The complaint in this case has no analogy to a judgment creditor's, and therefore the decision in the case in 5th Sandford (as distinguished from the *dicta* contained in it) cannot be applied to this case.

III. The case in the 5th Sandford, (apart from its decisions applicable to a judgment creditor's bill,) is in conflict with all the previous decisions upon the subject in our own Courts. (*Hendricks v. Robinson*, 2 Johns. Ch., 284; *Bayard v. Hoffman*, 4 id., 450; *Brinckerhoff v. Brown*, 4 id., 671; *Spader v. Hadden*, 5 id., 280; *McElwain v. Willis*, 9 Wend., 548; *Beck v. Burdett*, 1 Paige, 308; *Clarkson v. De Peyster*, 3 id., 320; *Dix v. Briggs*, 9 id., 596; *Coe v. Whitbeck*, 11 id., 42.)

IV. The opinion of the Court, in 5th Sandford, as applicable to any other than a judgment creditor's bill, is not sustained by the authorities cited in its support.

The authorities cited by Mr. Justice CAMPBELL, in giving the opinion of the Court, are the English authorities exclusively. They are cited by Chancellor KENT as sustaining the decisions in *Johnson*, and by Chancellor WALWORTH and Chief Justice NELSON, and others, in the subsequent decisions.

It will be seen that Chancellor KENT, as well as the other eminent Judges, in their several decisions, state the reasons for the principles established (as set forth under the 1st point) with

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much elaborate discussion and reasoning, as well as citation of the English authorities; but Mr. Justice CAMPBELL says, in allusion to these cases, "they are mere *dicta*, and no reasons are given in any of these cases in our Courts for the doctrines which they declare."

Mr. Justice CAMPBELL was led into a total misapprehension of the doctrine announced by the English authorities, by reason of his erroneous supposition of the existence of analogies where no analogy exists.

The doctrine is simply this, that the Chancery jurisdiction, in aid of a creditor seeking to reach the property of his debtor to satisfy his judgment, depends altogether upon the creditors having proceeded to the extent requisite to acquire a lien upon the property designated, by taking the last step available to that end, at law. Now, each English case, without exception, referred to by Chancellor KENT, and with one exception, by Judge CAMPBELL, was where the property sought was either personal or equitable interests; and inasmuch as a lien by a judgment creditor could only be acquired upon this character of property in the one case by the issuing of an execution upon the judgment and placing it in the Sheriff's hands, and in the other by the issuing and returning an execution unsatisfied, and the filing of a bill; it follows, that in such cases, unless this is averred to be done, there is no jurisdiction in Chancery. As a necessary consequence of this doctrine, (as to property other than real,) in a case where the property sought to be reached is real estate only, inasmuch as the lien of the judgment creditor upon this, under our statute, becomes absolute by the mere docketing of the judgment, and is not made more absolute, more perfect, or more specific, by the issuing of an execution, it was considered, by Chancellor KENT, as an irresistible logical deduction, that in such a case, in which the judgment creditor seeks the aid of a Court of Chancery solely to reach the real property of his debtor, the jurisdiction attaches upon the docketing of the judgment, because that act is the last available step which the creditor can take at law for the perfecting his lien and completing his title.

Mr. Justice CAMPBELL, in addition to the English authorities cited by Chancellor KENT, cites and relies upon one recent decision in England. It will be seen, under the next point, how

entirely he has misapprehended the authority of that case, and how completely it sustains the *dicta* of Chancellor KENT.

V. The opinion in the case in 5th Sandford, so far as it is applicable to other than creditor's bills, strictly so called, is based upon clearly erroneous assumptions of facts and analogies.

1st. Mr. Justice CAMPBELL says: "The statutes of this State make judgments, when docketed, liens on the real estate of the debtor; *but these liens are general, not specific.*" On the contrary, they are both general and specific. No lawyer will pretend that the lien of a judgment creditor upon his debtor's real estate can be made more specific, more absolute or more perfect by the issuing of an execution upon the judgment.

2d. Mr. Justice CAMPBELL says: "In England, by force of ancient statutes, as under our laws, the judgment becomes, from the time of its docket, a lien upon the freehold estate of the debtor." This is not so. On the contrary, in England, as in some of our own States, Kentucky, Mississippi and North Carolina, judgments do not become liens upon their being docketed, but only upon the delivery into the hands of the Sheriff of an execution or *elegit*. And this leads to the

3d. Erroneous assumption in the case in 5th Sandford. Mr. Justice CAMPBELL says that "the *elegit* in England is analogous to our writ of *fi. fa.*" This is not so. On the contrary, the issuing of the *elegit* on the judgment, in England, is essential to the acquisition of a lien upon the real estate of the debtor. The *fi. fa.* under our law performs no such office. The lien is perfect, specific and absolute when the judgment is docketed, and before the *fi. fa.* is issued.

4th. These several erroneous assumptions are at the basis of the misinterpretation, by Mr. Justice CAMPBELL, of the authority of the case of "*Neate v. The Duke of Marlborough*," which is relied upon as the support of the decision in 5th Sandford. For if it be not true that "the *elegit* in England is analogous to our writ of *fi. fa.*," and if it be not true that "in England, by force of ancient statutes, as under our laws, the judgment becomes a lien upon the freehold estate of the debtor from the time of its docket," and if it be true that in England the issuing of the *elegit* upon the judgment is essential to the acquisition of the lien, then it follows that Lord COTTENHAM in giving the opinion of the Court

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in *Neate v. The Duke of Marlborough*, that a judgment creditor cannot come into Chancery for aid, to reach the realty of his debtor, without first suing out his *elegit*, in truth announces the very doctrine promulgated by Chancellor KENT, and by all the early decisions in our own Courts. It is only necessary to read the opinion of Lord COTTENHAM, in the case cited, a little further than the language of it, as quoted by Mr. Justice CAMPBELL, to demonstrate the erroneous assumptions of the case in 5th Sandford, and to show how completely the authority of the English cases is perverted by reason of these errors.

VI. The opinion in the case in 5th Sandford, so far as it is applicable to cases other than those analogous to judgment creditor's bills, strictly so called, is not only unsupported by the English decisions, cited to sustain it, and in conflict with all the previous decisions in our own Courts, but it is repudiated by every subsequent decision in our own Courts of concurrent jurisdiction and authority, in which the question has arisen. (*Cooper v. Clason*, 1 Code Rep., N. S., 347; *Parshall v. Tillou*, 13 How. P. R., 7; *Greenwood v. Brodhead*, 8 Barb., 593.)

In the case last cited, the principle, as evolved from all the authorities, is briefly and very clearly stated, and acquires an importance, because, as stated, it is subsequently cited with approval by our Court of Appeals. The principle is thus stated:

"I think the true rule is this: To authorize any person to demand the aid of this Court in directing the appropriation of partnership property, he must *have a lien*, either *legal* or *equitable*, upon it, or must be in a situation to assert such lien. A creditor must obtain such a lien on the property before he can control it. If it be *real estate*, he obtains this lien by judgment, docketed. If personal property liable to execution, by the issue of an execution and levy; and if choses in action, by the return of the execution unsatisfied, and the filing his complaint."

VII. The opinion in the case in 5th Sandford, so far as it is applicable to the case of a judgment creditor seeking merely to set aside a fraudulent conveyance of real estate, which operates as an obstruction to the satisfaction of his judgment, by the enforcement of its lien, is repudiated by the clearest expression of opinion, if not by the authoritative decisions of the Court of

Appeals. (*The Chautauque Bank v. White*, 2 Seld., 236; *Crippen v. Hudson*, 3 Kern., 161.)

VIII. The provisions of sections 127, 135, (5th subd. of the last clause,) 136 and 139 of the Code, applied to the facts of the case, show that the execution had in truth been issued upon the plaintiff's judgment, (April 11th, 1857,) nearly a month before this action was, in judgment of law, commenced—which was certainly not before service upon the fraudulent grantee out of the State, namely, May 6th, 1857.

She is the only party against whom any relief is sought.

Without service upon her, no proceeding could be taken in the action by the plaintiff of any kind whatever.

The *lis pendens*, although filed at the time of service on the other defendants, had no operation at all until May 6th, 1857, when the holder of the fraudulent title was served.

A purchaser for value, between the time of service on the other defendants and on the fraudulent grantee, would, unquestionably, have been protected, notwithstanding the *lis pendens*.

IX. If an execution had in fact been issued before the action was commenced, and if the issuing of an execution is a fact necessary to constitute the cause of an action like this, then the equities, as disclosed by the case, clearly require that the plaintiff have leave to supply the averment by amendment.

1. The objection is purely technical and formal.
2. It might have been raised, at the commencement of the action, by demurrer.
3. If sustained, it operates to defeat another action.
4. If sustained, and the plaintiff is compelled to bring another action, his rights are lost; the property is sold, and the principal defendant is beyond the reach of process.

J. M. Robertson, for defendants, (respondents.)

I. This action cannot be maintained against the defendants, John L. Colby or Mary Ann Colby, because no execution had been issued on the judgment, which is the foundation of this action, at the time it was commenced. (*N. A. Fire Ins. Co. v. Graham*, 5 Sand. R., 198.)

The case in 5 Sandford, above referred to, so far as it concerns this point, is entirely analogous to the present. There the com-

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plainants had obtained a decree for a deficiency on a sale of mortgaged premises, and the bill charged that at the time of contracting the original obligation, and for a long time subsequently, the defendants were the owners of certain real estate described in the bill, and that the same was conveyed away, fraudulently, prior to the docketing of the decree; the prayer of the bill is (among other things) that the conveyance made by them be set aside; that, hindrances and incumbrances being removed, the complainants may issue execution. In the present case, the plaintiff had obtained a judgment against J. L. Colby, and the complaint charged that he had, fraudulently, prior to the docketing of his judgment, conveyed the real estate described in the complaint to Mary Ann Colby, and prays that said conveyance be declared void and canceled of record.

The object of the action in both cases is to remove an obstruction to the enforcement of the lien of a judgment.

II. The law, as announced in the *North American Fire Insurance Company v. Graham*, is founded in principle, and is in accordance with the well established rule in England, as well as the general understanding and practice of this State. (*Neate v. Duke of Marlborough*, 3 Myl. & Craigh., 407; 9 Simons, 60; Mitf. on Pl., 114, Dublin ed.; Story's Eq. Juris., § 1216; *Wiggins v. Armstrong*, 2 J. Ch. R., 144; *Bennett v. Musgrave*, 2 Ves. Sen., 51; 3 Atk., 200; Cooper's Eq. Pl., 149.)

It will be seen by the above cases that it is well established in England that a bill in equity cannot be filed to remove obstructions upon a freehold estate without having first issued an *elegit*.

There is a perfect analogy between an execution in this State and an *elegit* in England. A judgment in this State binds the real property from the time it is docketed; in England it binds the land from the time it is signed. (Statute of Frauds, 29; Car. II, ch. 3, and statute 1 and 5 Vict., ch. 110, § 19; Blackstone's Com. by Chitty, vol. 2, p. 326.)

But a judgment in England or in this State, does not give a lien within the proper sense of that term, for it gives no possession or right to possession of the property; the judgment merely binds the property, it is merely an obstruction to the conveyance of the property, and the effect of the execution is to give the creditor a legal title. The object of the *elegit* in England is to

put the creditor into possession of the property, and of the execution in this State to put him in possession of the property or its proceeds, and thus perfect his lien or title; and having done all he can do to perfect his title, if he finds an obstruction to his execution, he is then in a condition to ask the aid of a Court of Equity to have it removed. But if he never asserts the lien of his judgment by execution, is this Court to give him the benefit of a lien to which he has never asserted his right?

It is a well established rule that the aid of a Court of Equity cannot be sought until every remedy at law has been exhausted. The law has given a remedy by writ of execution, and this writ is the only means provided by law for the enforcement of a judgment; a judgment itself never satisfies a demand; it is merely a final declaration of rights between the parties, declaring his right to enforce payment by execution. The plaintiff in this case has not availed himself of a remedy with which the law has armed him; he has left untried the only remedy which could have given him satisfaction; and he is asking the aid of a Court of Equity, without having first exhausted his remedy at law.

It is against the policy of the common law, as well as the express statutes of this State, to sell real property for debt, except upon a certain contingency, namely, the want of sufficient personal property to satisfy the demand. There must be a complete exhaustion of all remedies against personal property; the writ commands that the judgment first be satisfied out of the personal property, and failing in this, then he may resort to real estate; and until it has been ascertained that the debtor has no personal property, you cannot touch a single inch of the land. *A fortiori*, you cannot move in a Court of Equity to remove incumbrances on the land until that fact has been ascertained. But how is this Court to know that this contingency has ever happened? How is the Court to know that any remedy has been sought against personal property, except by the issuing of an execution, which is the only way the law has provided—the highest and best evidence, which is the kind of evidence the law requires? It is not the party who is to be the judge of whether there is personal property or not; that is the prerogative of the Sheriff alone. The law, for wise purposes, has taken it out of the hands of the party.

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But suppose, immediately after judgment is obtained, a bill is filed to remove incumbrances, with an averment that there is no personal property, and after a protracted litigation the incumbrance is removed; but in the meantime, in the mutations of fortune, the debtor has acquired ample personal property to satisfy the judgment; then when an execution would be issued, the Sheriff would satisfy the judgment out of the personal property, and the protracted proceedings to remove the incumbrance would be nugatory and of no practical effect; but if execution has been issued before suit brought, and the incumbrance removed, the creditor may proceed against the real estate without reference to the question whether or not, in the meantime, the debtor may have become possessed of sufficient personal property to satisfy the judgment. His right to proceed solely against the real property has been perfected by his execution.

In every case found in the reports of this State, where a decree has been made setting aside a conveyance of real estate for fraud, an execution had first been issued. (*Hendricks v. Robinson*, 2 John. Ch. R., 284; *Clarkson v. De Peyster*, 3 Paige, 320; *Beck v. Burdett*, 1 id., 305.)

In *Brinkerhoff v. Brown*, (4 John. Ch. R., 671,) the complainant filed his bill before he had recovered judgment; and Chancellor KENT says: "The legal remedy by execution must first be tried." "This Court is not to know by anticipation that it will be ineffectual." And he adds: "It is sufficient to observe that I find the rule to have been long and uniformly established, that to procure relief in equity by a bill brought to assist the execution of a judgment at law, the creditor must show that he has proceeded at law to the extent necessary to give him a complete title." The rule referred to is that stated in Mitford's Pleadings, above referred to.

The case of the *North American Fire Insurance Company v. Graham*, is the only case to be met with in the reports of this State where the question has been argued and adjudicated. The highest tribunal known to this Court, which has passed on the question, has solemnly decided, after a full argument, that the action cannot be maintained; and it is the duty of the Court to sustain the decision upon the principle of *stare decisis*, even if its soundness should be doubted; for the correction of the error

will not compensate for the evil of shaking the stability of the decisions of this Court. If the decision were wrong, the plaintiff is not without his remedy. The Court of last resort is the proper tribunal to correct the error if it existed. (*Ourtis v. Leavitt*, 15 N. Y. R., 188.)

BY THE COURT—HOFFMAN, J. It is admitted that the only question before us on this appeal is, whether a complaint filed by a creditor who has obtained a judgment against his debtor, for the purpose of setting aside a conveyance as fraudulent, must not allege an execution issued and returned, or at least that an execution has issued.

The case of *The North American Company v. Graham*, (5 Sandf., S. C. R., 197,) is an authority which ought apparently to dispense with any examination of the present case, and to call upon us to rest the decision of this appeal upon that alone. It has been commented upon with industry and ability, and its correctness disputed upon many grounds, of more or less weight. In my opinion, it can be supported, as the true exposition of the law; and we are at liberty and may be usefully employed in sustaining its authority.

Before the statute of 13 Edward I, cap. 18, the lands of a debtor could not be reached in any mode for obtaining satisfaction of the debt, except, 1st, in a case involving the King's prerogative, and 2d, against the heir on a lien created by his ancestor, such as a statute, staple, &c. This, Lord COKE observes, seems strange; custom and usage had so far encroached on the common law. (*Harbert's case*, 3 R., p. 12.)

The *levari facias* was, as far as I can understand, used only in three cases. The first was upon the process of outlawry, when after the *capias utlagatum* there could issue a *venditioni exponas* to sell the goods; a *scire facias* to collect the debts; and a *levari facias* to levy the issues and profits of the land. (Watson on Office and Duty of Sheriffs, pp., 160, 161, 163; Law Library, vol. 7, p. 115, &c.)

The second was upon a recognizance binding lands being forfeited. (Tenny de la Ley, 479; Fitzherbert *Natura Brevium*, fol. 265, D.)

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The rents and profits were alone taken. Possession was not delivered, and the third case was of proceedings against clerics.

The statute of 13 Edward I, cap. 18, provided as follows: "When debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of *feri facias* unto the Sheriff for to levy the debt of the lands and goods; or that the Sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one-half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of *novel disseisin*, and after by a writ of *redisseisin* if need be." (Statutes at large, vol. 1, p. 98.)

The form of the *elegit* was this: commanding the Sheriff "that of all the goods and chattels of the defendant in his bailiwick (except his oxen and beasts of the plough) and also a moiety of the lands and tenements in the Sheriff's bailiwick, of which the defendant, on the day the judgment was obtained or at any time afterwards, was seized, he should cause without delay to be delivered to the plaintiff, by reasonable price and extent, to hold the said goods and chattels as his own proper goods and chattels, and to hold the moiety of the said lands and tenements, as his freehold, to him and his assigns, according to the form of the statute, until the debt and damages should be thereof levied." (Brownlow's Brevia Judicialia, p. 77; Watson, Office, &c., of Sheriff, p. 207; Law Library, vol. 7, p. 149; Moyles' Book of Entries, 37; Curzon's Law of Executions, 150.)

Some points of moment were well established under this statute. First, all the goods were delivered at a price found by a jury in a manner which was afterwards prescribed. The goods were not sold as upon a *fi. fa.* Second, the word "price" was referred to the goods, and the word "extent" to the lands. Each was to be appraised through a jury. The goods were delivered at such appraisement, and the moiety of the lands, at the annual value so found. Third, if the chattels taken were sufficient to satisfy the debt, the Sheriff was not to extend the land. (2 Inst., 395.) Fourth, we see that the form of the writ imports that the judgment had at least this effect, that when the *elegit*

was sued out, the land owned at the day of obtaining the judgment could be delivered.

The statute of 29 Car. II, cap. 3, § 10, was intended to enable a judgment creditor to reach the land of a *cestui que trust*. It was adopted in our former statute. (1 R. L. of 1813, p. 74.) But it was that the land could be reached where a party was seized in trust for the debtor at the time of the execution sued. This was held to refer to the seisin of the trustee, and therefore where he had conveyed with assent of the *cestui que trust* before execution, though after judgment, the land could not be taken. (*Hunt v. Coles*, Comyn R., 226.)

It was a fixed principle of the law, that a judgment operated by relation as of the first day of the term in which it was obtained. "If judgment for debt or damages was given in banco upon a trial at *nisi prius*, the plaintiff shall have execution of the land which the defendant had at the day of the *nisi prius*, for this and the day in banco are but one day in law." (Dyer's R., 149.)

"So he shall have execution of the land the day the inquest is taken; but he shall not have execution of the lands that the party had on the day of the writ purchased." (Year Book, 29 Ed. III, 27.) Again, "if a man recover debt, he may sue execution of any land the party had at the time of the judgment, though he had aliened it before execution. So of any land that he had purchased after the judgment, although he had aliened it before execution." (Year Book, 30 Ed. III, 24.)

The statute of 29 Car. II, cap. 3, §§ 13, 14, 15, (Statutes at large, vol. 3, p. 886,) has this remarkable preamble: "And whereas it hath been found mischievous that judgments in the King's Courts at Westminster do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation time, after the said term, whereby many times purchasers find themselves aggrieved." Then the act directed the day of signing to be entered on the margin of the roll, and the paper book or record signed by the Judge. They were to be judgments from that time, and not from the first day of the term as to purchasers. (See also the Statute 4, 5, William and Mary, cap. 20, 3 Statutes at large, 526.)

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It was held under the statute of *elegit* that if there were goods and chattels to the value of the debt, the land should not be extended. (45 Ed. III, 22, b; 2 Inst., 59, 395.) We are to notice that under the first clause of the *elegit*, whatever goods and chattels could be taken upon the old writ of *fieri facias* might be taken under the *elegit*. (Watson on Sheriffs, 207.)

In Virginia the statute giving any right to lands under a judgment is almost a transcript of the statute of Westminster, the second. 13 Edw. I. (*Burton v. Smith*, 13 Peters R., 480.) And Chief Justice MARSHALL, in *The United States v. Morrison*, (4 Peters, 124,) says: "There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged."

In that case the point decided was, that the right to take out an *elegit* was not suspended by suing out a *fieri facias*, and, consequently, that the lien of the judgment continued pending the proceedings on that writ. The decision proceeded upon that of the Court of Appeals in Virginia, which, no doubt, was the case of *Coleman v. Cook*. (8 Randolph's R., 618.)

In the last case, writs of *fi. fa.* had been issued. The Sheriff had made some part of the judgment creditor's debt upon them, and had not returned *nulla bona* as to the rest of the demand. No other execution had been taken out. The bill in Chancery to reach property was sustained.

In *Burton v. Smith*, (13 Peters, 464,) a case arising in Virginia, a judgment was obtained and an *elegit* issued upon it. The judgment was had in June, 1827, the *elegit* issued in October, and a deed, under which the questions arose, was made in August of the same year. The question was, whether a reversion expectant on an estate for life was bound, and could be reached in a Court of Chancery and be sold under its decree. The Court say: "In relation to lands of which the debtor has the actual seisin, there is no doubt but that the judgment creates a lien." The language in *The United States v. Morrison*, (*supra*,) is then quoted; and, after examining authorities, the Court proceed: "We are, therefore, satisfied that the judgment of the appellees bound the reversionary interest in the land in question." The contest was between

the judgment creditors and a purchaser under the deed of August.

In *The Bank of the United States v. Winston*, (2 Brock., 252,) Chief Justice MARSHALL says: "The lien depends on the right to sue out an *elegit*." In *Massingill v. Downs*, (7 How. U. S. R., 760-768,) it is observed: "The lien, if not an effect of the judgment, is inseparably connected with it. And this is the case whether the lien was created by the judgment and execution or by statute."

In *Coutts v. Walker*, (2 Leigh's R., 268,) Walker recovered judgments against Patrick Coutts, son of Reuben Coutts, on the 2d of March, 1821, and sued out executions thereupon. Two deeds were executed by Patrick between the first day of the term and the day of the actual rendition of the judgment. These deeds were alleged to be fraudulent. No proof of this was given; but the question arose, whether a certain equitable interest of the judgment debtor, which was in him on the first day of the term, could not be reached by a bill in Chancery of the creditor. It was held that this could be done. Two points were declared: 1st. A judgment creditor obtains a lien in equity on an equitable estate, as he acquires a lien at law on a legal estate; 2d. Judgments related to the first day of the term in which they were rendered, except, in England, as to purchasers under 29 Car. II, ch. 3, § 14. That act was not part of the law of Virginia.

It deserves notice that the most accurate English writers speak of the judgment forming a lien upon, or binding, the lands.

Thus, Baron Gilbert, (on Executions, p. 38,) says: "The judgment binds, not only the lands and tenements of which the defendant is actually seised, but also the reversions on leases for lives, as well as for years."

So in 2d Wm. Saunders, 68: "Judgments bind, not only lands of which the defendant is actually seised, but also reversions; and, therefore, a moiety of a reversion may be extended."

Watkins on Descents, (p. 40,) uses similar language: "It is upon these principles that the authorities lay down the doctrine that a judgment binds a reversion after an estate for life."

These expressions of elementary writers are referred to, by BARBOUR, J., in the case of *Burtin v. Smith*, above cited.



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Mr. Bingham, (on Judgments and Executions, Law Library, vol. 13, p. 40,) says: "As against the defendant and his heirs, the judgment binds a moiety of all the freehold lands and tenements which he, or any person in trust for him, were seised of at or after the time to which the judgment relates."

So, Chancellor WALWORTH, after noticing that the Statute of Westminster does not, in terms, create a lien so as to prevent a sale before execution, observes that the uniform construction of the statute has been to give such a lien upon all lands which could be reached by the process of the Court, from the entry of the judgment. (*Manhattan Co. v. Evertson*, 6 Paige, 457-467.)

It deserves notice, also, that the judgments of the United States Courts become liens solely by force of the process act of 1792 and 1789, making the forms of writs and executions the same as those used in the Supreme Courts of the respective States. Where the execution can take real estate held at the time of the judgment, the lien prevails. (*Konig v. Bayard*, 1 Paine & Duer's Pr., 289; *Manhattan Co. v. Evertson*, *supra*; *Taylor v. Thompson*, 5 Peters' R., 358.) The line of reasoning of Mr. Justice THOMPSON in *Konig v. Bayard* is quite pertinent to the present question.

It seems to me quite illogical, and inconsistent with the form of the writ and the admitted operation of the statute, to say that the *elegit* created the lien on lands. If it did, the lien could not have existed before the writ issued, and the statute could not have warranted the taking of lands aliened after the judgment, and before the *elegit* was issued.

On the other side, the statute did not, in express words, declare the judgment a lien, as has been done in statutes in many of our States—for example, in our old act of 1813. It may, then, not be logical and precise to say that the judgment created the lien.

Yet the statute does, practically and substantively, amount to this. The judgment shall operate to give to the judgment creditor a power to take lands held at its date, whenever he shall take out a writ of *elegit* to enforce such power. This is a right to take the moiety of the land. What is this but a right to do something with the land?—to subject it to payment of his demand? The general use of language authorizes us to call this a lien.

These views aid in the estimation of the authority of *Neate v. The Duke of Marlborough*. (3 Mylne & Craig, 407.) As a decision it is explicit that an *elegit* must be issued, although it need not be returned. It is shown that the case of *Manningham v. Lord Bolinbroke* was a case of a demurrer overruled, because it was not necessary to state the return of the writ, although it was so as to its having been issued.

The language of Lord COTTENHAM imports merely that the judgment *per se* gives no title to the land, and therefore does not authorize an application to the Court of Equity. It is the act of Parliament which gives the legal title upon taking out the writ—that legal title or right being to bring ejectment. If obstructed in this, the Court gives its aid. In other words, it is not because there was nothing of lien, but because the creditor had not asserted such lien by the usual process—in truth, had not shown a remedy at law ineffectual.

The view, which I consider as entirely satisfactory upon this point, is this: I have before shown that it was an ancient rule, that if there were goods and chattels sufficient to pay the debt, lands should not be extended. The *elegit* comprised in one writ the direction to make the debt out of goods and chattels, and out of a moiety of the lands. The construction and rule which required that the goods should be first resorted to, has been adopted in terms in all the executions known in our State since the year 1787.

Thus, in the law of the 19th of March of that year, (1 Greenl., 407.) section 7, the execution to be issued against lands and tenements is to command the Sheriff that of the goods and chattels he make the debt, &c., and if sufficient goods and chattels cannot be found, then he cause the debt to be made of the lands, &c. Section 9 of the revised act of 1813, (1 R. L., 502,) is exactly to the same effect. The provision of the Revised Statutes of 1830 is substantially the same. (2 R. S., 367, § 24.) And the Code is, that if the execution is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property, and if sufficient personal property cannot be found, out of the real property belonging to the debtor on the day when the judgment was docketed.

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In all this there is the plain principle found that personal property is the primary fund for payment of the judgment debt, and an execution to reach such property is the regular and known method of ascertaining whether it exists or not. It is presumed that the Sheriff does his duty and will levy upon personal property if it can be found; but to raise this presumption the writ must, of course, be in his hands.

This line of reasoning tends to support the right to file such a bill as the present, after execution issued, and before its return, upon allegations of the inability of the Sheriff to find personal property, and of the interposition of the fraudulent transfer of real estate; and for this we shall find considerable authority in the cases hereafter mentioned.

It is insisted by the defendants' counsel that no case can be found distinctly holding that a fraudulent transfer of real estate may be set aside without an execution issued.

The following are the leading authorities in our Courts connected with a fraudulent conveyance of real estate:

In *Brinckerhoff v. Brown*, (4 Johns. Ch. R., 671,) there is nothing but the general language of Chancellor KENT, which the counsel has referred to, which tends to support the proposition that an execution is not necessary. The property in question was personal. No execution had been taken out, nor judgment recovered, when the bill was filed, but a judgment was obtained during the pendency of the suit. The case offered no ground as to real estate, as the legal remedy was plain and open. In *Hendricks v. Robinson*, (2 Johns. Ch. R., 283,) the bill was by a judgment creditor, and after execution issued. It was to set aside conveyances of real estate, as well as transfers of personal property. The Chancellor held that the conveyances of the real estate were void, and should be declared fraudulent. The bill was filed in June, 1809. The execution had been issued on the 6th of February, 1809, upon judgments recovered in the month of January, 1808. The conveyances were made in March, 1808. There is nothing to show that the executions had been returned; but there was an allegation in the bill, after the statement of the issuing of the executions, that by reason of the said fraudulent transfers (above stated) the plaintiff could obtain no satisfaction of his judgments. This case, then, involves the proposition,

that after execution on a judgment a transfer of real estate may be set aside in equity. It involves also, as I think, the proposition that such execution need not be returned. It tends to negative the proposition that a judgment without execution is sufficient. And when the language of Chancellor Kent is considered, (see p. 296,) used when he is treating of the transfer of the real estate, we are almost authorized to say that he deemed the issuing of an execution essential.

In *Brinckerhoff v. Brown*, (6 Johns. Ch. R., 139,) the executions of all the co-plaintiffs, (judgment creditors,) had been returned. The bill was to reach many things besides real property.

The decisions of Chancellor WALWORTH, upon questions of fraudulent conveyances and transfers, are very numerous. I select that of *King v. Wilcox*, (11 Paige, 589,) as pertinent to the present inquiry. The complainants had obtained a judgment, and had issued an execution. It is not stated that the execution had been returned, only that Wilcox had no property on which the execution could be levied, except the premises specified in the deed assailed. It was real estate conveyed, and the conveyance was set aside.

The Bank of Orange County v. Fink, (7 Paige, 87,) was a case of an execution taken out, and real estate alone in question. In *The Bank of the United States v. Housman*, (6 Paige, 527,) the executions had been returned.

It is true that in *Clarkson v. Depeyster*, (3 Paige, 320,) the Chancellor does say: "That for the purpose of obtaining the relief sought it was not necessary for the judgment creditor even to sue out execution; that he might have filed his bill in respect of the lien, and to clear the real estate from an incumbrance improperly or fraudulently interposed at any time after the docketing of his judgment." Yet, in the case, the judgment creditor had issued and had an execution returned, and the creditor by decree had the execution in the hands of the Sheriff. The latter was a lien from the time of issuing the execution.

The Chancellor refers to 1 Paige, 305, and 4 Johns. Ch. R., 677. The former case (*Beck v. Burdett*) cannot give support to the proposition; I think its language is hostile to it. The other case (*Brinckerhoff v. Brown*) does not sustain it.

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In *The Mohawk Bank v. Atwater*, (2 Paige, 54,) the complainants had taken out executions on their judgments, under which a sale had been made, and they had purchased the property. They then filed a bill to set aside fraudulent conveyances. The Chancellor does indeed repeat the proposition stated by him in *Clarkson v. Depeyster*.

With the exception of these *dicta* of the very learned Chancellors I have mentioned, and the *dictum* of Assistant Vice-Chancellor SANDFORD in *Storm v. Waddell*, (2 Sandf. Ch. R., 510,) there is not, I believe, to be found the least authority warranting the proposition that an execution need not be issued, down to the period of the close of the Court of Chancery in our State.

I have gone over numerous cases decided since that time. In the following a conveyance of real estate comes in question, generally connected with transfers of personalty: *Nicholson v. Leavitt*, (4 Sandf. S. C. R., 258; 2 Seld., 510,) *The Chautauque Bank v. White*, (2 Seld., 236,) *Brigham v. Tillinghast*, (3 Kern., 215,) *Collomb v. Caldwell*, (16 N. Y. R., 484,) *Barney v. Griffin*, (2 Comst., 365,) a case limited to real estate, and of a bill after execution returned unsatisfied; *Crippen v. Hudson*, (3 Kern., 161,) *Greenwood v. Brodhead*, (8 Barb., 593,) *Bishop v. Hulsey*, (3 Abb., 400,) *Wilson v. Forsyth*. (24 Barb., 105.) There is nothing in either of these cases that approaches to a decision of the point contended for by the plaintiff's counsel. There are a few general expressions scattered through the opinions in its favor, and nothing more.

My conclusion is, that the *North American Company v. Graham* is not affected by any decisive authority, previous or subsequent, nor by any sound line of legal reasoning; that it announces the true rule; and that the judgment in the present case must be affirmed.

Judgment affirmed., with costs.

JOHN GARRISON, Plaintiff, v. THE MAYOR, &c., of the City
of New York, Defendants.

1. Proof that a coach driven upon one of the piers owned by the corporation of the city of New York at the foot of one of the streets, breaks through a plank that is decayed, by means of which the plaintiff's trunk is thrown into the river, and its contents damaged, is not sufficient to sustain an action against the city for the injury, nor to put the defendants to proof of reasonable and proper care and diligence in keeping such pier in repair. (WOODRUFF, J., dissented.)
2. In order to establish, even *prima facie*, a right of action the plaintiff must show affirmatively on his part not only that the plank was decayed, but that the proper officers of the corporation had notice that it was decayed, or show that it was obvious to the eye without any particular examination. (WOODRUFF, J., dissented.)

(Before WOODRUFF, PIERREPONT and MONCRIEF, J. J.)

Heard, February 8; decided, December 10, 1859.

ACTION to recover damages alleged to have been sustained by the plaintiff by reason of the carelessness and negligence of the defendants in not keeping in repair a certain public wharf and pier owned by the defendants, and in their care and control, and which they were bound to keep in a good and safe condition, at the foot of a street on the North or Hudson river.

The answer denied all the allegations of the plaintiff.

The action was tried on the 23d day of November, 1858, before Mr. Justice PIERREPONT and a jury.

On the trial it was expressly admitted that the defendants are and were in the month of August, 1856, owners of the pier, in question, at the foot of Spring street, on the North river, and thereupon the plaintiff proved by the driver of a coach, that he drove his coach, in which was the plaintiff, having also the plaintiff's trunk thereon, from the hotel to the pier in question to carry them to a steamboat lying at the pier; that two steamboats were lying there and he had passengers for each; that after delivering passengers and their baggage to one he turned to drive to the other; that in turning he got his coach crosswise of the pier when one of the planks gave way, the wheel of the

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coach went through and the coach swung over, and the plaintiff's trunk was thereby thrown into the water with several others; that he had driven over that part of the dock in going to the boat and saw no crack or hole in it, but that, in turning, the wheel had become lengthwise of the plank; that his coach was much heavier than an ordinary carriage, but that the weight upon the coach when it broke through was not one-twentieth part of what it was when he drove on to the dock.

Another witness gave evidence tending to show that the plank was unsound, and in part black when it broke and in some part light-colored or "fresh." That he could see the plank before it was broken; it was not covered with dirt but was dirty; he saw no hole or crack till it broke.

Other evidence was given to show that the trunk was properly stowed on the coach, the driver stated that the trunk had support enough by the rail around the top of the coach, and he had never known a trunk fall off.

Another witness said the trunks were put on as is usual. That in carrying trunks in the manner stated one trunk binds another, and that the mode is perfectly safe, and instanced his own experience of many years in confirmation of his opinion.

No witness stated any contrary opinion. Proof was also given of the contents of the trunk, and that they were damaged by being wet, to the extent or amount of \$350.

Upon these proofs the plaintiff rested his case, and on the defendants' motion the Judge ordered a nonsuit. To which the plaintiff excepted, and the exception was ordered to be heard in the first instance at the General Term, and the judgment to be in the meantime suspended.

George C. Goddard, for the plaintiff.

I. The defendants being owners of the pier, receiving a compensation for its use by the public, are under the same obligations to keep it in a safe condition, and subject to the same liabilities as an individual owner.

"Municipal corporations in their private character, as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly." (*Bailey v. The Mayor, &c.*, 3 Hill, p. 541, affirmed 2 Denio,

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434; and see *Rochester W. Lead Co. v. City of Rochester*, 3 Comst., 468.)

II. It was then the duty of the defendants to keep the pier in a safe condition, and they are liable for losses arising from neglect of that duty. (*Hutson v. The Mayor, &c.*, 5 Sand., 289; 5 Seld., 163.)

An implied contract to this effect exists between those who use the bridge or pier, and the owner.

III. The plank broke because it was rotten, and with a light weight upon it, and this caused the loss.

This raises a presumption of negligence, either in the building of the bridge, or in keeping it in repair; casting the burden of proof on the defendants, if it admitted of explanation, consistent with due care. And the question should have been submitted to the jury. (*Ware v. Gay*, 11 Pick., 106; *Chester v. Griggs*, 2 Camp., 79; *Stokes v. Saltonstall*, 13 Peters, 181; *Holbrook v. The Utica and Schenectady R. R.*, 2 Kern., 236; *Foot v. Wiswall*, 14 Johns, 304.)

IV. In this case, however, the negligence is not left to presumption—it was proved.

An examination of the pier, such as was defendants' duty, where life and property are at risk, would have disclosed the rotten timber. (*Bailey v. Mayor, &c.*, 2 Denio, 440.)

V. It was claimed on the trial, and made one of the grounds of the application to dismiss the complaint, that the owner of the coach was guilty of negligence, and that, therefore, the plaintiff could not recover.

1. If such was the rule of law, it would be a question for the jury whether there was negligence or not.

2. The negligence of the owner of the coach, if any, could not be visited on those carried in it, either by an action against them, or by depriving them of a right of action they would otherwise have.

A new trial should be granted, costs to abide the event.

R. Busteed, for defendants.

I. The corporation is not liable, except for such negligence on the part of its agents as occasions injury to those who have a right to be where the injury occurs.

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II. The city is not liable at all for accidents which cannot be prevented by the use or exercise of ordinary skill in the construction of its piers and streets, and ordinary care and prudence in their management.

III. Assuming that the plank which was broken by the wheel of the coach was rotten, the corporation would not be liable unless it was proven that the timber was unsound and not fit for use when the pier was built, or that having become so the city had neglected to replace it after notice of its defective condition, or upon the lapse of reasonable time after the condition of the plank had become patent.

IV. This accident was clearly a case of the *vis major*; was produced by the accumulation of weight upon a single point, occasioned by the turning of the coach, and was inevitable. Neither an individual nor a corporate body is liable for such an accident, in the absence of fraud or deceit, unless there has been an express stipulation to be so. The liability of the corporation in a case like this arises only from default to repair after the accident. (*Keighley's Case*, 10 Coke's R., 139.)

V. Negligence cannot be inferred. The law disfavors such a presumption. In this case the facts contradict the theory of negligence or default on the part of the corporation. The breaking of the plank and the loss to the plaintiff were simultaneous. It is not attempted to be shown that the plank was unsound when the pier was built, and it cannot be held that it is the duty of the corporation to inspect every stone in all of its sewers, and every post or plank in its piers, to ascertain their condition.

VI. There is no evidence to support the proposition that the plank was in fact unsound before the accident. Cantril merely says it "was rotten where it broke." He did not examine it. He had just driven over that part of it, and saw no "crack" or hole in it. The witness Baldwin says it looked to him unsound; but he also testifies that "it looked fresh in some places" where it was broken.

VII. There was no evidence in the case at all as to the amount of damages, upon which the jury could estimate the extent of the injury. The only testimony on the subject was hearsay, and wholly uncertain at that.

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VIII. All the cases cited by the appellant as to the presumption of negligence, refer to a different class of responsibilities than those by which a municipal corporation are bound. They are applicable to common carriers, as such, and are only valuable as adjudications in reference to them.

BY THE COURT—MONCRIEF, J. This action was based solely upon a claim for damages caused by the alleged carelessness and negligence of the defendants, in not keeping in repair the wharf and pier upon which the accident happened.

There is no allegation or proof that the wharf was not properly constructed; on the contrary, there is evidence tending to show that the original structure was good, and proper for the uses intended.

The plaintiff in such a case, before he can recover, must introduce evidence from which it may distinctly appear:

1. That the plaintiff did not essentially contribute towards the accident by his own carelessness, negligence and want of reasonable skill.

2. That the defendants were guilty of negligence in not repairing the wharf before the accident happened.

The law recognizes "accidental injuries," for which there is no redress, and it is a mistake to suppose that every one who suffers damage by accident, can, as a matter of course, make somebody pay for it. (2 Greenl. on Ev., 9 ed., §§ 222, 243.)

If the defendants are liable in this case, it is only on the ground of negligence in not repairing the wharf prior to the accident, and not unless upon affirmative proof of such negligence as ordinary and reasonable care would have avoided.

The corporation of this city are not to be held to such miraculous foresight, nor superhuman prudence, as will enable it to discover the earliest moment that the sun and rain began to weaken one plank, by decay in its numerous docks, nor to know which plank of its many thousand that one may be. That need of repairs, (if such it can be called,) which reasonable diligence and care cannot discover, it will not be called negligence to overlook.

The defendants offered no evidence; but the plaintiff showed that the coach was the very large one used by the St. Nicholas Hotel, far heavier than the ordinary hack; that it had some passengers and trunks, and that the trunks in question, with others,

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were upon the top of the coach without any fastening whatever; that they were two or three feet high, protected only by a slight railing some six inches high; that the coach drove over the plank to the boat, let out some six or eight passengers with their trunks, and then, in attempting to turn its wheels, which could not pass under it, became cramped and got straight across the dock, and in backing in this cramped condition the hind wheel was pressed lengthwise upon a plank, and went through it; as the coach swung the trunks "went off" into the water; that the coachman had just driven over the very same part of the wharf with a much heavier load, and saw no crack or hole in it; that a policeman was stationed there that morning and three or four days previously, and was there often before the accident, and knew of no defect; that the plank was not concealed by dirt, and that there was neither crack nor hole to warn the most cautious until it broke; that no accident had happened there, and no warning whatever had been given; that the plank was some eight inches wide, two and half or three inches thick, and when taken up after the accident presented some indications of rottenness or decay; and it clearly appears that, until the moment of the accident, there never had been anything to advise the most vigilant of necessity to repair.

The accident, notice of decay and the occasion to repair, were simultaneous facts.

No practicable degree of skill or care could have foreseen or discovered that the plank had decayed until the happening of the accident. At what time should an examination take place, and how frequently shall it be renewed? Must the watch and examination of each plank and every stone laid upon the piers and in the streets of the city of New York be constant and unremitting? (18 N. Y. R., 536, 537.)

Many of the cases cited by the counsel for the appellant were against common carriers, and are not applicable to this action, except in some instances to furnish reasoning against the proposition urged by him. In *Christie v. Griggs*, (2 Camp., 80,) MANSFIELD, Ch. J., says: "If the axle-tree was sound as far as human eye could discover, the defendant was not liable."

In 9 Bingham, 457, a coach proprietor, a common carrier, is held liable for all defects in his vehicle which can be seen (and should

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be avoided) at the time of the construction, as well as for such as may be found afterwards on investigation. The axle-tree contained a defect which could be seen at the time it was used in making the coach, and could have been detected by taking off the wood work.

1 Carrington & Payne, 636, lays down the rule "that a count upon an undertaking to carry a passenger safely cannot be supported without proof of actual negligence of the defendant. (*Ingalls v. Bills et al.*, 9 Met., 1-15.)

In *Bailey v. The Mayor*, (3 Hill, 541; affirmed, 2 Denio, 433,) the action was for want of proper care and skill in the construction of the dam. Abundant evidence was given tending to show that it was not properly constructed for the uses intended.

In 5 Sandford, 289, the action was for negligence of the defendants in not repairing a public street. It appeared in evidence that there had been an excavation made in the street; that it was not protected or indicated by a light to warn passers-by. The plaintiff at night met with the accident. Proof of negligence was given, though the case turned upon the question of liability of agents of the defendants, and was defended mainly upon that ground.

In 3 Comstock, 464, the action was for negligence in constructing a culvert. Evidence was given, and the Referee found that the construction was insufficient.

In 3 Hill, 612, notice of the insufficiency of the sewer and of the necessity to repair, was given before the injury.

In 23 Wendell, 446, the defendant had constructed a bridge over which, as a part of the public highway, the public had the right to pass, and were constantly passing, and the bridge was held to be a nuisance, and the defendant to be liable for any damage resulting from accidents happening by reason of the defendant's neglect at all times to keep that part of the road as free from liability to accident as if such bridge had not been constructed. The defendant was a wrong-doer, and became an insurer to the public that the bridge should at all times be safe and free from liability to occasion damage. In such a case, therefore, proof of the accident throws the *onus* upon the defendant to excuse his *prima facie* negligence. The same principle was properly held in this Court, (affirmed, 18 N. Y. R., 84,) in the case of *Congreve v. Morgan*. (5 Duer, 495.)

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The defendants in the case under consideration were engaged in the legal use of their own property, and no nuisance existed. The wharf was not shown to be out of repair or unfit for use, and no inference of omission or neglect of duty could arise.

If a tenant covenant to keep the house in repair, and it becomes ruinous by accident, the covenant will not become broken till after a convenient time for its repair has elapsed. (2 Shep. Touch., 173, ch. 7.) In the case of *Mayor of Lyme Regis v. Henly*, cited by the counsel for the appellant, (plaintiff,) it was distinctly held, that in order to make the corporation liable, four things must appear, and among them, 3d. That the place in question was out of repair. (5 Sandf., 315, 21, 3.)

There was no conflict of evidence. The facts were indisputable. An accident happened by which it was discovered that a plank had previously in part become decayed and rotten. The plaintiff claimed that the fact of decay was *prima facie* evidence of negligence of the defendants. In my opinion the evidence would not have warranted the jury in finding the defendants guilty of negligence or carelessness; the action, therefore, could not be sustained, and the Court properly dismissed the complaint. Judgment should be entered for the defendants, with costs, &c.

PIERREPONT, J., concurred.

WOODRUFF, J. (Dissenting.) It is conceded that the defendants are the owners of the pier and wharf at the foot of Spring street. That wharf forms the lower extremity or terminus of Spring street on the North river; it forms the landing place where the street or highway meets the river. The proof showed that the coach, with the plaintiff and his trunk, was driven to that wharf, in due course of business, to deliver some passengers to a steamboat there lying; that on turning the coach one of the planks forming the covering of the wharf broke by reason of its being rotten, the wheel of the coach went down and the coach was partially overturned, the plaintiff's trunk was thrown into the water, and his goods were damaged. It further appeared that there was dirt on the surface of the wharf, so that the defect in the plank was not apparent from mere observation while walking or traveling over it.

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I think that upon these facts alone the plaintiff should not have been nonsuited.

The defendants are charged with the duty of seeing that the streets and highways of the city are kept in proper repair and safe condition for use by the public. (*Hutson v. The Mayor, &c.*, 5 Seld., 163; 5 Sandf., 289; *Storrs v. The City of Utica*, 17 N. Y. R., 104.) This is not denied; nor is it claimed that their duty in regard to the public wharves at the foot of the streets, open and used as public landing places, is any less stringent. Nor can such a claim be made, especially when they are not only so used, but they are for the purpose of collecting wharfage and deriving profits therefrom, regarded as being the very property of the corporation.

If, then, the duty exists, it carries with it the incidental duty to use some diligence to see that the wharves do not, by the operation of ordinary and natural causes, get out of repair or go to decay, and so endanger the lives or property of those who in the lawful pursuit of their business have occasion to use them. (See the above cases and *Henly v. The Mayor of Lyme Regis*, 5 Bing., 91.) The doctrine contended for by the defendants seems to me to be, that, having built a wharf, the defendants may rest without subjecting it to any examination for an unlimited time, and until some one gives them notice that repairs are necessary, or until the want of repairs becomes so apparent to a merely superficial observation that they must be deemed chargeable with notice. This view of their duty will often result as in this case; the surface of the wharves are of course in some degree covered with dirt, and knowledge of the defect will only be gained when an accident happens.

In the present case, the question is, whether enough was not proved by the plaintiff to cast upon the defendants the burden of showing due diligence in the performance of their duty. They are not insurers against accidents. They are not bound to anticipate every cause of defect in the streets, or liable for not remedying every defect, when it is not shown that they had notice, or by reasonable diligence might have known of its existence. (*McGinily v. The Mayor*, 5 Duer, 674.) They cannot anticipate every case of neglect or misconduct of individuals which may, for the time being, create defects in the street, which

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however it will become their duty to remedy so soon as notified, and so soon as by reasonable diligence they might know it, whether notified or not.

The wharf in this instance was unsafe. The plank broke because it was a rotten or decayed plank. No evidence was given by either party as to the time when the wharf was constructed, or under what precautions to secure its being done properly.

At the time of the accident it was not safe. This was owing to a defect in its construction, or to its being suffered to remain until by the operation of natural causes one of its planks had decayed.

The corporation must be held to know that planks are liable to decay; and, knowing this, it is their duty to use at least ordinary diligence, in view of the uses to which wharves are devoted, to inspect them and see that they are in a proper condition; and here enough was done to devolve upon them the burden of either showing that such diligence was used, or that by such diligence the defect could not have been discovered and remedied.

I think the nonsuit should be set aside and a new trial ordered, costs to abide the event.

Judgment ordered for the defendant.

SETH W. PECKHAM v. KETCHUM, ROGERS & BEMENT.

1. Where a broker is instructed to purchase, as such broker, for the plaintiff, a specified number of shares of the stock of a corporation named, and he accordingly contracts to buy the specified number and receives a certificate of stock regular in form and issued by the proper officer of the corporation for the specified number of shares, receives payment therefor from his principal and makes payment to his vendor, and such certificate proves to be valueless and not to represent actual stock, such broker, where he has acted in good faith and according to the customary course of business among brokers in such cases, is not liable to his employer for any damage resulting to him from such transaction and purchase.

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2. It will not affect the question of such broker's liability that the shares he so bought were transferred to him by the vendor on the books of the Company, and by him transferred to his principal, and that he did not disclose to the vendor his agency in the transaction—that being according to the established and customary course of business in such transactions.

(Before HOFFMAN and MONCRIEF, J. J.)

Heard, October 21; decided, December 17, 1859.)

THIS action comes before the Court upon an agreed state of facts, submitted pursuant to section 372 of the Code.

On the 14th of June, 1854, the plaintiff called at the office of Ketchum, Rogers & Bement, bankers and stock brokers, and asked them if they had any shares in the New York and New Haven Railroad Company for sale. They said they had not, but would, if desired, buy some for him, that day, at the Brokers' Board. He ordered them to buy for him ten shares, at a price not exceeding \$87 per share.

The same day they sent to the plaintiff the following memorandum:

	"June 14, 1854.
"10 shs. N. Y. & N. H. R. R., @ 86½,	\$865 00
"Com's,	2 50
"SETH W. PECKHAM.	<u>\$867 50"</u>

He sent them his check that day for the \$867.50, and they stated that they would transfer the stock referred to in the memorandum into his name on the books of the Company that day, but the certificate would not be ready until the next day. The next day they delivered to him a certificate in due form for ten shares of said stock, signed by Robert Schuyler, the Transfer Agent of said Railroad Company, who was the proper officer to issue the same.

The firm of Ketchum, Rogers & Bement, after receiving the plaintiff's order, and on the same day, bought ten shares of one Charles Graham, who in fact had no stock, but had, in good faith, made a contract with Moses Allen for the delivery of ten shares that day.

Graham, on making the contract with defendants' firm, went to the office of the Railroad Company, and, with the consent of

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its officers, transferred ten shares on its books to defendants' firm, who were thereupon credited on said books with ten shares, and ten shares were charged to Graham's account. This being done, the defendants, with the like consent of the officers, transferred ten shares to the plaintiff, to whose account they were credited on the books of the Company, and the certificate which the plaintiff received was made out and delivered to him.

Graham stood debited with the ten shares on said books until June 22, when it was balanced by a transfer to him, by Allen, of ten shares.

The certificate issued and delivered to the plaintiff did not represent actual stock, and was valueless. The defendants' firm, on receiving the certificate for the ten shares which they delivered to the plaintiff, paid Graham for the ten shares.

In purchasing from Graham and taking a transfer of the ten shares to themselves, and on receiving the plaintiff's check, the defendants' firm acted in good faith "in the mode usual and customary among stock brokers in the city of New York, among whom it is not usual to disclose the names of their principals to persons with whom they dealt."

In due time, after discovering that the certificate received by him did not represent actual stock, the plaintiff tendered a return thereof to the defendants, and demanded from them a repayment of the money he had paid to them therefor; with which demand they refused to comply.

The question submitted was: Is the plaintiff entitled to recover anything, and, if so, how much, from the defendants? If entitled to recover nothing, judgment was to be rendered for the defendants, with costs; which costs, the parties by agreement inserted in the submission, were adjusted at \$100.12.

John S. Jenness, for plaintiff.

I. The vendor of chattels impliedly warrants that the article sold is substantially what it purports to be, where the vendee had no opportunity for inspection. (Long on Sales, 204; *Jones v. Bright*, 5 Bing., 533; *Shepherd v. Kain*, 5 B. & A., 240; *Henshaw v. Robbins*, 9 Metc., 83; 1 Parsons on Contracts, 465, and note; *Gallagher v. Waring*, 9 Wend., 20; *S. C.*, in Error, 18 id., 426; *Lighbody v. Ontario Bank*, 11 id., 9; *S. C.*, in Error, 13 id., 101.)

The certificate given to the plaintiff in this case turned out to have been issued without authority, by the Transfer Agent, in excess of the capital stock of the Company. It was, therefore, void stock. (*Mech. Bank v. N. Y. & N. H. R. R. Co.*, 3 Kern., 599.)

II. The defendants were, in this transaction, the plaintiff's vendors.

1. Graham cannot be held to be plaintiff's vendor. No privity whatever existed between them; he sold directly to the defendants, and cannot be deprived of any defenses or counterclaims he may have against them.

2. Defendants were not brokers in this transaction.

A broker is a mere negotiator between other parties. (*Pott v. Turner*, 6 Bing., 702, 706.)

He never acts in his own name, but in the names of those who employ him. (*Baring v. Corrie*, 2 Barn. & Ald., 143, 148, 149; *Kemble v. Atkins*, 7 Taunt. R., 260.)

He is not intrusted with the possession of goods, and is not authorized to buy or sell them in his own name. (*Baring v. Corrie*, *supra*.)

A broker becomes a factor when he buys or sells in his own name, or is empowered to obtain possession of what he buys. (Story on Agency, § 34, and note; 1 Bell Com., 386, 478; *Kilby v. Wilson*, Ryan & Moody, 178; *Kemble v. Atkins*, *supra*; *Short v. Spackman*, 2 Barn. & Adol., 962; *Waring v. Mason*, 18 Wend., 425; *Jones v. Littledale*, 6 Adol. & Ellis, 486.)

III. An agent, who really is employed as such, and is known to be employed and acting as such, is, nevertheless, liable as principal, unless he disclose his principal at the time of his contract. (Story on Agency, § 267; *Waring v. Mason*, *supra*; *Mills v. Hunt*, 20 Wend., 431; 2 Kent Com., 630, 631; *Franklyn v. Lamond*, 4 Com. Bench, 637.)

IV. The liability of defendants has been affirmed by express adjudication in similar cases. (*Jones v. Ryde*, 5 Taunt., 488; *Lamert v. Heath*, 15 Mees. & Welsf., 486; *Mitchell v. Newark*, 10 Jur., 318; *Westropp v. Solomon*, 8 Com. Bench, 345; *Brown v. Boarman*, 11 Clark & Finnelly, 1; *Jones v. Littledale*, *supra*.)

V. The circumstance that such worthless stock passed current in the market without suspicion is only material upon the question of defendants' care and diligence as agents.

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VI. The general custom of stock brokers not to disclose the names of their principals, even if established, (which it is not,) by no means implies a custom that in such cases stock brokers are not subject to the legal liabilities which flow from their assuming to act in their own name. The latter custom is not found, and could not be legally sustained. (*Magee v. Atkinson*, 2 Mees. & Welsf., 440; *Mills v. Hunt*, *supra.*)

Francis N. Bangs, for defendants.

I. The foundation of this suit is a contract by which plaintiff employed defendants as brokers. The obligations of defendants under this contract were to use good faith and due diligence and the usual methods of accomplishing the object directed. Unless the case states, what it does not state as matter of fact, bad faith, fraud, want of diligence or neglect of the ordinary mode of dealing, no reason for a recovery is shown.

II. The use by the defendants of their own name in making the purchase, was not an act of either bad faith or negligence, nor did it convert them from brokers into principals as against plaintiff.

1. This was the usage of that business. Of this usage plaintiff was bound to take notice. (*Bayliffe v. Butterworth*, 1 Exch. R., 425; *Mitchell v. Newhall*, 15 Mees. & Welsb., 308.) It was therefore one of the terms of their employment that they should use their own names. (*Sutton v. Tatham*, 10 Adol. & Ellis, 27.) And it was a part of plaintiff's contract that he should indemnify them against any liability incurred by them for him in that employment. (*Westropp v. Solomon*, 8 Common Bench, 345; *Kemble v. Atkins*, 7 Taunt., 260; *Child v. Morley*, 8 Term R., 610.)

2. If it was one of the terms of the employment that the defendants should make such a contract as would give plaintiff a remedy against the vendor for any defect in the stock, the case does not show that such remedy against Graham is impaired or impeded by the purchase in the name of the defendants.

III. The case shows nothing else which the Court can say, as matter of law, was a neglect of any duty incumbent on defendants as brokers.

What duty can the Court say they ought to have performed before paying the money to Graham? They could do no more than ascertain Graham's title. They could ascertain this only by evidence. This evidence would consist of acts, declarations and entries of the Company's officers.

If the Company gave effect to Graham's act of transfer by entering the defendants as stockholders to the extent of the stock transferred, then the defendants had the evidence of an act, declaration and entry of the Company's officers and agents. This was the highest and best evidence they could obtain.

It is submitted that the Court may safely say, as matter of law, that these brokers were justified in paying over the money to the vendor upon finding that the Company acknowledged his title and his conveyance as valid.

IV. The recovery does not depend upon the question whether the stock was or was not genuine. In *Mitchell v. Newhall*, (15 Mees. & Welsb., 308,) the broker bought a letter of allotment, under instructions to buy shares; yet in that case and in *Lamert v. Heath*, (15 Mees. & Welsb., 486,) it was held that the fair construction of the order was for the jury; that they ought to say whether the principal had not ordered the thing which the broker bought.

V. The authorities cited by the plaintiff's counsel are either inapplicable or sustain the defense. But few of them present questions between a broker or other agent and the person employing him.

BY THE COURT—HOFFMAN, J. The plaintiff applied to the defendants to purchase from them ten shares of the stock in question. Being informed that they had none to sell, the plaintiff then distinctly employed them as brokers to purchase for him that amount of shares.

The contract between the plaintiff and defendants, therefore, was, that they were to buy the stock from some third party for his account. He gave them the money to fulfill this contract, and they, in effect, paid that money to the seller of the stock.

The plaintiff dealt with the defendants as stock brokers, and was bound by those customs which prevailed in relation to that species of business. (*Horton v. Morgan*, 6 Duer, 56; affirmed on

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appeal, 19 N. Y. R., 170.) The Court above say, "the practice at the Stock Board, by which the brokers only, and not their customers, are known in their dealings with each other, was not unreasonable, and the plaintiff, by directing this purchase to be made, must be understood as consenting that it should be done in the usual manner." The case before us states, that in making such purchase from Graham, and in causing or permitting the ten shares to be transferred to them before calling upon the plaintiff to pay, and in receiving said check from plaintiff, Ketchum, Rogers & Bement acted in the mode usual and customary among stock brokers in the city of New York, among whom it was not usual or customary to disclose the names of their principals to persons with whom they dealt.

This is sufficient to establish a special custom, although it is in proof, also, that some brokers make use of what is called "purchase notes," in which the purchasers and seller's names are inserted.

This custom, then, of which the plaintiff is to be assumed to have had notice, puts him, I think, in the same position, as in the case of a contract made distinctly with one as the agent of a known or disclosed principal. (*Rathbon v. Budlong*, 15 John. R., 1; *Mauri v. Heffernan*, 13 id., 58; *Ex parte Hartop*, 12 Ves., 352; *Lewis v. Nicholson*, 18 Queen's Bench R., 503.)

"No rule of law," says Lord ELDON, "is better ascertained, or stands upon a stronger foundation than this, that where an agent names a principal, the principal is responsible, not the agent, but, for the application of that rule the agent must name his principal as the person to be responsible."

A party who deals with another, or employs another avowedly as an agent, to make a contract with some one who he consents shall remain unknown at the time, cannot have a better right against the agent than if the principal had then been disclosed. The employment, with the presumed knowledge of the custom, is equivalent to a consent.

The leading case of *Westropp v. Solomon*, (8 Common Bench R., 345,) cited by the plaintiff's counsel, appears to me hostile to his claim. The plaintiffs were brokers, and were employed by the defendant to sell certain scrip, which turned out to be invalid. The certificates were such as to deceive everybody who dealt

with them. There was no fraud or negligence on either side. Still they were invalid. The brokers paid the purchase money back to the vendees, as also a certain sum which, under rules of the Stock Exchange, had been prescribed to be paid in such cases. They then sued their principal, who paid into Court the purchase money but contested as to the additional sum. The defense was sustained.

The Court say: "It seems to be agreed that when a principal employs an agent, the former is bound to indemnify the latter, in respect of all payments which may be made by him in the due course of his employment. The agent may recover moneys so paid under a special count stating a promise to indemnify, or under a count for money paid. The vendees were entitled to recover back the money paid for the stock."

I do not think that the employment of the defendants, in this case, can justly be treated as an employment to purchase genuine stock, to the extent and import of making them guarantors of the validity of that which they should purchase. It was rather to purchase what in the market was passing as stock of this description. (*Lamert v. Heath*, 15 Mees. & Welsb., 486.) Then the rule of indemnity to the agent when the principal is a seller, involves the exemption of the agent from responsibility, when, under similar circumstances, the principal is the purchaser.

Again, an agent employed to purchase a commodity of a particular character or quality, is only bound to use all the circumspection and diligence which a prudent purchaser himself would exercise. The nature of the article, the opportunity of detecting the defect or inferiority, with proper diligence, are elements in every case of this description. (*Mainwaring v. Brandon*, 8 Taunt., 202; *Van Alen v. Vanderpoel*, 6 John. R., 69; *Liotard v. Graves*, 3 Caines' R., 226.) The defendants could not be held responsible under this rule.

Judgment should be rendered for the defendants with the costs as adjusted in the submission, viz., \$100.12.

Judgment ordered accordingly

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 Fish v. Jacobsohn.

WILLIAM FISH, Plaintiff and Respondent, v. ISAAC JACOBSON, Appellant.

1. In an action by the payee of a check against the drawer, it is no defense that it was given by the defendant for a debt owing by a third person to one who was the payee's principal; and that the payee accepted it as agent for the debt due to his principal, the payee being expressly authorized to settle such debt and receive payment of it.
2. Such agent, on receipt of such check, having credited his principal with the amount of it, and having subsequently, in consequence of receiving it and before it was protested, paid other moneys to his principal's said debtor which otherwise he might have retained and applied upon the debt for which the check was given, and such check being in terms payable to such agent's order, he can maintain an action on it, in his own name.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, November 3; decided, December 17, 1859.

AN appeal by the defendant from a judgment in favor of the plaintiff, entered on the report of B. W. Bonney, Esq., as Referee.

The action is on a check, or bill of exchange, in these words, viz.:

"NEW YORK, March 16, 1859.

"L. S. Lawrence & Co., Bankers, pay to Mr. William Fish, or order, three thousand $\frac{2}{100}$ dollars. \$3,000 $\frac{2}{100}$."

"ISAAC JACOBSON."

L. S. Lawrence & Co. refused to pay this check, and it was protested, and due notice was given to the defendant.

The plaintiff resides in London, and is the agent of Benjamin Lumley, who also resides there, and is the proprietor of a theatre. The plaintiff came to New York in February, 1859, to receive, as such agent, all moneys coming to Lumley as his share of the proceeds of representations and concerts given and then being given in the United States, by Piccolomini, pursuant to a contract in that behalf between Piccolomini, Lumley & B. Ullman.

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In February and March, 1859, several such representations and concerts were given in New York and in other parts of the United States, and various sums of money were paid to the plaintiff as agent of Lumley, on account of Lumley's portion of the proceeds thereof. The defendant was, at the time, acting as Ullman's agent in this business at New York; Ullman being absent at the south. The plaintiff demanded of the defendant, as Ullman's agent, a full settlement, which the defendant promised should take place.

On the 11th of March, 1859, there was a representation at New Orleans. The plaintiff being then in that city, demanded of Ullman, who was also there, a full settlement. On the 12th of said March, Ullman promised the plaintiff to give to him, before noon of the 14th, the defendant's check for the whole sum due to Lumley, or to assign the whole net proceeds of future concerts, until Lumley was paid the whole balance due to him. On the 14th of March he made such an assignment to the plaintiff, and on the 16th of March the defendant, at New Orleans, gave to the plaintiff the check in question; which check was given by the defendant, and received by the plaintiff, for \$3,000.25, that being the aggregate of two sums, viz.: \$2,555.75 for the balance of proceeds of concerts prior to March 11, 1859, due to Lumley, and \$444.50, Lumley's share of the proceeds of the concert of March 11, 1859. The plaintiff gave a receipt for the check, specifying for what it had been given, and in his account with Lumley, credited him with the amount of the check.

The plaintiff, under the assignment aforesaid, received the whole net proceeds of three concerts given on the 16th, 18th and 19th of said March; and having received defendant's said check for the sums and cause above stated, paid to Ullman's agent, Ullman's portion of the proceeds of the said three concerts.

The defendant defended this action, brought on his said check, on the grounds that he gave the check without consideration, and that no action would lie on it in the plaintiff's name; and if any one could recover upon it, Lumley alone, as the actual party in interest, must sue as plaintiff.

The Referee decided that the plaintiff received and held the check for a good and sufficient consideration, and could main-

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tain an action upon it in his own name, and was entitled to a judgment for \$3,068.49 (principal and interest) and his costs. The defendant excepted to these conclusions severally, and appealed to the general term from the judgment entered in accordance with the Referee's decision.

John Townshend, for defendant, (appellant,)

Insisted (1st.) that the consideration of the check was open to inquiry between the parties to this action; (2d.) the presumption is that the check was received as a conditional, and not as an absolute payment; (3d.) an agent, *prima facie*, has no right to receive payment otherwise than in money, and payment by a bill will be treated as unauthorized; (4th.) the promise of a third person to pay the preëxisting debt of another, for which he is not liable, is without consideration and void.

Also, that it appears the plaintiff is suing as agent, and it is not alleged he had authority to receive the check; he was not the proper party to sue. The check was given to Lumley, and the plaintiff shows no authority to sue in his behalf.

T. H. Rodman, for plaintiff, (respondent.)

I. The complaint avers that the check was given in settlement of a balance due by Ullman to Lumley. The answer, that it was given to pay a debt claimed to be due by Ullman to Lumley, but that in fact no such debt was then and there due.

On this answer, on which the cause was brought to trial, the plaintiff was entitled to judgment.

II. The amendment, called a further answer, did not alter the case except by requiring the plaintiff to prove the presentment of the check, which he did.

III. In addition to this, he proved by his own oath the whole transaction.

Defendant was Ullman's manager; promised plaintiff a settlement of accounts, on his arrival in New York from England. Defendant procrastinated, and evaded a settlement in New York; paid \$1,500 on account in Cincinnati, and promised to close the whole matter when the party reached New Orleans.

There Ullman promised to settle by giving defendant's check, and if he failed to do so, to assign to him the net receipts of the

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theatre at New Orleans, until the balance was liquidated, and did so.

Then defendant promised his check and gave it, and took a receipt for it in settlement of balance of concert account, and profits of performance in New Orleans.

On the faith of this check, plaintiff paid over the portion of expenses of the next performance in New Orleans, and Ullman's share of profits which plaintiff had previously received; and did the same as to three subsequent performances.

Upon these facts, the conclusions of law necessarily follow.

The judgment should be affirmed, with costs.

BY THE COURT—HOFFMAN, J. Two of the propositions of the learned counsel of the defendants, in the elaborate points submitted, may be conceded to be law. One, that the consideration on which the draft was given could be inquired into between these parties, and that a plea of no consideration made out could be a defense. The other is, that the giving of the draft in question did not extinguish Lumley's demand upon Ullman.

The case of *Crofts v. Beale*, (5 Eng. L. & Eq. R., 408,) is strong upon the first point, and applicable in its facts to the present case. *Pratt v. Foote*, (5 Seld., 463,) and *Noel v. Murray*, (3 Kern., 167,) may be referred to for the second proposition. "The substitution of one executory agreement to pay for another, is no satisfaction of the debt, unless there is an express agreement to accept the new obligation as a satisfaction of the old."

But a distinction exists on the facts of the present case, growing out of the law of mercantile paper, which is sufficient to sustain the action. It is well established law in this Court, that a note made for the accommodation of a payee, and by him passed to another as security for a preëxisting debt, may be recovered upon. (*De Zeng v. Flye*, 1 Bosw. R., 335, and cases cited.) In that of *The Bank of Rutland v. Buck*, (5 Wend., 66,) the surety to a note given for the accommodation of the principal, was held liable when passed away as collateral security for payment of a judgment.

Thus, in the present case, the defendant has given this draft for the accommodation and benefit of Ullman, and it has gone

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to the plaintiff as security for Ullman's debt, and he is liable upon it. But this leads to another question.

The debt was not owing to the plaintiff, but to Lumley, and it is objected that Fish is not the proper party to bring the action.

The promise is made to him by his own name, without further designation or qualification. It purports to be a contract with him personally. It is in every just sense made with him, and he may sue thereon. (*Considerant v. Brisbane*, 2 Bosw., 471.)

We think the judgment must be affirmed, with costs.¹

JOHN S. PATTERSON, Administrator, Plaintiff, v. SAMUEL PERRY
et al., Defendants.

WHITE, WARNER & WHITE, Appellants, and GEORGE MILNE,
Respondent.

1. Where the owner of goods, residing in Ohio, consigned them to a factor residing in New York city, for sale, and such factor, on advice of shipments of goods from time to time, and on receipt of bills of lading for such goods advanced to the consignor, and on the 6th of April, 1854, the consignee's advances and charges exceeded in amount the value of the consigned property which had then come to hand, but were less in amount than the value of the whole consigned property, (including the value of that for which bills of lading had been received, but which had not then arrived,) and all of such consigned property arrived by the 15th of June, 1854, and on subsequent sales produced a surplus, after paying all advances and charges, an attachment against the property of such consignor, issued under the Code, and served by delivering a certified copy of it to such factor on the 6th of April, 1854, will attach and bind such surplus, and such attaching creditor will hold it in preference to, and to the exclusion of, another creditor of such consignor, who obtains an attachment against the latter and serves it in like manner on the 15th of June, 1854.
2. This result will follow, although enough of the consigned property, to pay the factor's advances and charges, had not only not been received by the

¹ See Robinson's Practice, vol. 2, p. 34, and the cases there collected, which support the proposition, that as a general rule, on a contract not under seal, made with an agent in his own name, either the agent or principal may sue. (See, also, *Poor v. Guilford*, 6 Scid., 272.)

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factor, but had not arrived within the State of New York when the first attachment was issued and thus served.

3. Nor will it make any difference that the creditor issuing the second attachment became such creditor by discounting for said consignor, at the date and time of the last of said shipments, two bills drawn by the consignor against said shipment, and that the factor was advised, by the consignor's letter inclosing the bill of lading for that shipment, of the drawing of said two bills against said shipment, and was requested to honor the same; and such letter and bill of lading was received by the factor on the 5th of April, 1854, before the first attachment was served or issued.

(Before HOFFMAN, PIERREPONT and MONCRIEF, J. J.)

Heard, October 26th; decided, December 24th, 1859.

THIS is an appeal by the defendants, White, Warner & White, from a judgment declaring that they have no lien upon or right to the moneys forming the subject of the action, and directing that such moneys be paid to the defendant, George Milne, surviving member of a firm composed of himself and George W. Reed. The action was tried before Mr. Justice HOFFMAN, without a jury, on the 25th of February, 1859.

The action was commenced by John S. Patterson, administrator of Samuel Lewis, deceased, as plaintiff, to recover balance of proceeds of property consigned to the defendant, Samuel Perry, a factor and commission merchant, for sale, by one Albert Lewis, of Cincinnati, Ohio, and was brought against Perry alone. The plaintiff claimed that the property and the proceeds thereof remaining in Perry's hands, had been assigned by Albert Lewis to one Henry Lewis, and by said Henry to the plaintiff's intestate.

On the application of Perry, the said Albert Lewis and Henry Lewis, the firm of White, Warner & White, the firm of Milne & Reed, and John Orser, Sheriff, of New York, were also made parties, defendants.

On the further application of Perry, and on notice to all of said defendants, an order was made that Perry pay into Court the sum of \$8,696.62, the balance of proceeds in his hands, with interest from the 22d of March, 1856, to the credit of the cause, (in all \$7,618.73,) and that on doing so he be discharged from all claims from either party in respect to such property or its proceeds. Perry complied with said order.

At the trial, it was determined that the plaintiff had no right to such moneys, and the contest (as he did not appeal from the judgment) narrowed to one between the firm of White, Warner & White, and the firm of Milne & Reed, both of which firms claim such moneys by virtue of attachments issued by them against said Albert Lewis, and executed by said John Orser, as Sheriff of the city and county of New York.

The attachment against Albert Lewis, at the suit of White, Warner & White, was issued and served on the 6th of April, 1854. The property which Albert Lewis had then consigned to Perry, and which had come to the hands of the latter, was not of sufficient value to pay the advances and charges which Perry had made to said Albert Lewis thereon and upon other property not then received by him, but of the shipment of which he had been previously advised, and the bills of lading for which he had previously received.

But the property then in Perry's hands, which Albert Lewis had previously consigned to him, and that covered by bills of lading then in Perry's hands, which had not then arrived or been received by Perry, was worth more in the aggregate than the amount due to Perry for advances and charges. The property not yet actually received in New York, had been shipped and was in course of transportation to the city, and between the said 6th day of April (when the attachment of White, Warner & White was issued and served on Perry) and the 15th day of June, (when the attachment of Milne & Reed was served on Perry,) it all came into Perry's hands.

The proceeds of the last shipments made by Albert Lewis, were claimed by Milne & Reed to constitute the surplus in the hands of Perry, after paying his advances and charges. No property was shipped by Lewis after the 1st day of April, 1854, but on that day an invoice amounting to \$8,548.92 was shipped from Cincinnati to Perry; and on the same 1st of April, 1854, said A. Lewis drew two drafts or bills of exchange on Perry, each for the sum of \$4,202.99, one dated that day, and the other April 3d, to his own order, which two drafts were discounted for him by said Milne & Reed of Cincinnati, about the 1st of April, 1854, who paid the proceeds to said A. Lewis. On the same day, A. Lewis wrote to Perry inclosing the bills of lading for the property

shipped on said 1st day of April, advising him of having drawn said two drafts against the same, and requesting him to honor them. Perry received this letter on the 5th of April, 1854.

On the 6th of April, 1854, after the attachment of White, Warner & White had been served, these drafts were presented to Perry for acceptance. He refused to accept them on account of such attachment having been served, and they were protested for non-acceptance.

On the 15th of June, 1854, Milne & Reed, in an action commenced by them against Albert Lewis on said drafts, procured an attachment against the property of said Lewis, which was served upon Perry on the same day.

On or before the 15th of June, Perry had received the property shipped on the 1st of April, and also all prior shipments; and the sales of the consigned property extended into the following August and September. There was a balance produced from the whole property received by Perry, of the amount so as aforesaid brought into Court, over and above his advances and charges.

He made no advances at any time on the specific property shipped on the 1st of April, 1854, except the charges for freight, insurance, &c. On the 1st of April, 1854, he was a creditor of Albert Lewis to about the sum of \$25,000, having made advances from time to time, on being advised of the shipment of property, much of which had not then reached his hands; nor does the evidence show that it had arrived within the State of New York on the 6th of April, 1854.

White, Warner & White and Milne & Reed had prosecuted their attachment suits to judgment prior to the trial of this action, and the records of recovery therein were put in evidence.

Each attachment was served by a delivery by the Sheriff to Perry of a copy thereof, having indorsed thereon a certificate signed by the Sheriff, and dated on the day of such service, in these words, viz.:

"I hereby certify the within to be a true copy of the original warrant of attachment, as served by me in this suit, and that the attachment, of which the within is a copy, is now in my hands, and that in it I am commanded to attach and safely keep all the estate, real and personal, of the said Albert Lewis within my county, (except such articles as are by law exempt from execu-

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tion,) with all books of account, vouchers and papers relating thereto; and that all such property and effects, and the debts and credits of the said Albert Lewis, now in your possession, or under your control, are or which may come into your possession, or under your control, will be liable to said warrant of attachment, and you are hereby required to deliver all such property, &c., into my custody without delay, with a certificate thereof."

Perry sold the several shipments, indiscriminately, for the purpose of paying advances; not selling property first shipped to pay the advances first made.

The Judge held that the resulting general balance of \$6,696.62 was to be considered as derived from property received by Perry after the 6th of April, 1854, and most of it from that shipped on the 1st of April; that White, Warner & White acquired no lien on it under their attachment; but that the attachment of Milne & Reed was a lien thereon, and that the net surplus thereof be paid to Milne as survivor of Reed, he having died *pendente lite*.

White, Warner & White excepted to these conclusions severally, and from the judgment entered upon said decision they appealed to the General Term.

S. Weir Roosevelt, for appellants.

I. It is the opinion of the Court below, that the fund in dispute was chiefly produced by the sale of the last lot of goods, and that Perry had paid charges, but had not made advances on this last lot specifically. It appears, however, from Perry's accounts, which are in evidence, to have been the course of dealing between Lewis and Perry, not to discriminate among the various lots, but to sell a portion of one with another as suited the market, not keeping separate accounts with each lot; and if one lot did not fully repay advances, the next lot was sold to meet the deficiency, and such indeed is of necessity the general custom among commission merchants. It is therefore difficult to ascertain as a matter of fact which of the lots *per se* may fairly be said to have produced the fund in dispute. It appears to be conceded by all parties, however, that Perry was consignee of all the goods, and in possession of the bills of lading, with the right to sell the whole in order to pay himself advances, commissions and expenses, and he did sell the whole accordingly. No attempt

was made under either of the rival attachments, to take possession of the goods or interfere with Perry's sales, and nothing was done by the Sheriff beyond the service of copy and notice, and the Court finds that the last lot was subject to Perry's advances, which were a balance of advances not repaid by the proceeds of the previous lots.

II. Under these circumstances, we do not understand how the presence of the goods in the county can affect the priority of the attachments, as between these defendants. It has been determined (*Brownell v. Carnley*, 3 Duer, 9,) that the Sheriff cannot take possession of goods so consigned, and, in fact, he did not take possession. How, then, is the lien of an attachment made more strong by the bodily arrival within the county, or more weak by the non-arrival, of certain goods which the Sheriff is not permitted to touch when they come here, and which, as goods, are absolutely controlled by the consignee. It is even doubtful (see above case) whether the creditors could have obtained possession on any terms, but certainly they could not without paying Perry his advances and commissions on the earlier lots, and his expenses and commissions on the last lot. When no levy can be made on goods under an attachment, their precise location, at a given moment, is both theoretically and practically of little importance, and can certainly not settle priorities.

III. Neither of the attachments, therefore, could in law, or did in fact, reach the goods, nor can either be said to have reached the interest of the consignor in the goods. The interest of a party in goods, as such, cannot be considered as attached, when the creditor is not enabled, by force of the writ, directly or indirectly, to take possession of or control the property. Perry, the consignee, might rightfully have sold all the goods before they came into the county, and had, in all respects, complete control. (*Brownell v. Carnley*, 3 Duer, 9; *Bryce v. Brooks*, 26 Wend., 367; *Knapp v. Alvord*, 10 Paige, 205.) Supposing this and the former propositions to be assumed as correct, the question is, what was effected by the service of the certified copies of the writs and notices upon Perry, the consignee. It is conceded that, on the same day, but before the service of the first attachment, the bills of lading of the last lot of goods were

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received by Perry, and we contend, on behalf of White, Warner & Co., that at that moment the consignee, Perry, obtained the immediate right to sell the goods, and held the legal title, while Albert Lewis, the consignor, at the same moment, became so far a creditor of Perry, that the goods would be charged against Perry in anticipation of the final accounting. When the bills of lading came to hand, Perry might have forthwith sold the goods "to arrive," and forthwith transferred the title accordingly. What interest, then, did Lewis, the consignor, retain after the arrival of the bills of lading which could be the subject of attachment? He had, perhaps, the right of reclaiming the bills of lading, or of stopping the goods during their transit, a right which he did not exercise, and which no creditor did or could exercise for him by attachment. He had, also, perhaps, the right of demanding a return of the goods on paying the consignee his advances, if any, and expenses and commissions; another right not exercised, if capable of being exercised, by the attaching creditors. He had, lastly, a right, clear and unquestionable, which he did exercise, and that was, to consider Perry as a debtor charged with the goods, and personally responsible to account for the proceeds, and leave him to act upon the bills of lading, and exercise his own rights as consignee, undisturbed, receiving and selling the goods to pay the advances, if any, or if none, the expenses and commission. This last right as creditor, or interest of Lewis in a final accounting between himself and Perry, was the subject of attachment, (Code, §§ 234, 235,) and as it began to exist at the moment the bills of lading were received, it was reached first by the first attachment. The amount of indebtedness was, it is true, not yet fixed, but there was an existing interest, and the position of Perry may be compared to that of a person holding collaterals in pledge, in which case an attachment against the pledgor, served on such holder, would, we think, obtain priority for any surplus, although the balance of account could not be ascertained before a sale of the collaterals. Indeed, the amount between Perry and Lewis was not fixed until after the service of the second attachment, which, in this respect, as in many others, is in the same dilemma as the first. We contend, of course, as is in substance found by the Court below, that Perry rightfully held and sold this last lot to

repay a portion of the previous advances not refunded by the former lots, as well as expenses and commissions; but the case would not be varied, if the sale of the last lot had been merely to obtain a return of expenses and commissions; and we have endeavored to show that even under such circumstances the attachment of White, Warner & Co. has priority, because:

1st. Under neither attachment was any levy or inventory made, or possession taken of the goods.

2d. Under both, the inchoate indebtedness of Perry to Lewis was attached in the order of service.

IV. A levy under any attachment should enure to the benefit of a former attachment by statute, by analogy with executions at common law, and as a matter of sound policy. (*Peck v. Tiffany*, 2 Comst., 450, 457; *Ray v. Birdseye*, 5 Denio, 624, 625; *Solomon v. Freeman*, 4 Sandf. Ch., 515; 3 R. S., 5th ed., 645, § 15, [366]; Code, § 232; 12 J. R., 403.)

V. It must be noted that Lewis was not himself owner of the goods, but was consignee or pledgee, having made advances, and, therefore, possessing a lien which he transferred to Perry by the bills of lading; and this fact removes the goods, as goods, still further out of the scope of the attachment, and renders the interest of Lewis more plainly such a claim, as when assigned to Perry, was subject forthwith to attachment without reference to the location of the goods.

G. C. Goddard, for respondent.

I. It was found by the Court at Special Term, and was clear from the evidence, that, at the time of the attachment of White, Warner & White, April 6th, the advances and charges of Perry on the property of Albert Lewis, then in Perry's hands, much exceeded the value of the property; so that, as the accounts then stood, there was nothing to attach in Perry's hands; on the contrary, Lewis was largely a debtor to Perry. Also, that, at the time of the attachment of Milne & Co., June 15, all the property had been received by Perry, creating a balance in Perry's hands, which constitutes the fund in Court, and which was derived from the property received after April 6, and chiefly from that shipped April 1.

To which finding of facts there is no exception.

II. The decision at the Special Term was correct, that White, Warner & White, by their attachment, acquired no right to the proceeds of the property which arrived in New York, and was received by Perry after April 6, and that they were not entitled to the funds in Court.

Their attachment had no prospective operation, so as to reach property coming into the county, and into Perry's hands, after the service of it. It was served on the 6th of April, and at no subsequent time.

By the terms of the Code, and by the nature of the writ of attachment, no property is reached by it, except that in the county and on hand when it is served. (Code, §§ 231, 232, 235, 236, 240 and 241; 2 R. S., 2d ed., p. 44, §§ 7, 8, 28-34; *Learned v. Vandenberg*, 7 How. Pr. R., 379; & *C.*, 8 id., 77.)

Attachments in other States are analogous.

"The moment of service is the precise period when a debt is attached, and if it be then existing, it is secured by the process; but if it does not then exist, no lien is created, as *the operation of an attachment from its nature is immediate and not prospective.*" (*Fitch v. Waite*, 5 Conn. R., 122.)

"To constitute an attachment of goods, the officer must have the actual possession and custody. This results from the legal import of the word; and in this sense it is now to be understood." (*Lane v. Jackson*, 5 Mass. R., 162.)

In this respect, attachments are unlike executions, which take effect by delivery to the Sheriff, except against *bona fide* purchasers for value.

III. The bills of lading being in Perry's hands did not subject to the attachment property on the Ohio river, or elsewhere, on its way to New York. They are merely evidence of Perry's having some interest in the property, but have no effect to bring the property within the reach of the Sheriff.

As to that shipped on the 1st of April, Perry had then no interest in it, not having advanced or paid anything on it. (*Grant v. Shaw*, 16 Mass. R., 341.)

IV. Perry had a specific lien for his advances and charges on all the property, except that shipped on the 1st of April; on which last he refused to advance.

As against Milne & Co., had the question arisen, Perry would have been bound to look first to the property on which he had such specific lien. But the funds in Court are found, in fact, to arise from the property received after April 6, and chiefly from that shipped on the 1st of April.

None of the exceptions to the decision at Special Term are well taken, and the judgment should be affirmed, with costs.

MONCRIEF, J. The material question arising upon the evidence in the Court below was, whether "the attachment of Milne & Reed, though subsequent in time, took priority in effect?" And it was held it did; and judgment was ordered for the payment of the funds to them. This, in my opinion, was erroneous.

The Court below found that the debtor, Albert Lewis, had such an interest, or property, as was the subject of attachment. This view cannot be questioned: it is expressly so decided in 3 Duer, 9.

The property was in Samuel Perry, by virtue of his previous advances, and the possession of the bills of lading gave to him, as against the world, the right to receive the goods and to dispose of them. (3 Duer, 12; 5 Seld., 559.)

A notice of the issuing of the attachment was served upon Mr. Perry in each action. The same Deputy Sheriff had possession of both writs.

In the case of *White et al.*, the notice and copy attachment was received by Mr. Perry on the 6th day of April, 1854, and while the goods were on their way to New York. In the matter of *Milne & Reed*, the notice was served on the 15th day of June, 1854, and after the arrival of the goods at New York. Strictly speaking, neither attachment was levied upon the property in the hands of Mr. Perry, nor was there, on behalf of either party, such a service of the attachment as the law requires to create a lien. No inventory was made, and no notice given specifying the particular property or interest seized. (5 Duer, 250; 9 Conn., 530; 7 id., 271; 4 E. D. Smith, 448.)

In neither instance did the Deputy Sheriff receive a certificate from Mr. Perry.

The attachment of *White et al.* was a valid and continuing process in the hands of the Sheriff, at the time of the receipt and service of notice under the attachment of *Milne & Reed*.

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An attachment is an "anticipated execution" to take and hold the property, subject to a judgment in the action. (16 Johns., 107; *Thayer v. Willet*, in this Court, November 12, 1859.)

Executions in the hands of the Sheriff bind the goods, and any levy made by him enures to the benefit of the executions in the order in which they were received. (1 Cow., 592; 7 Taunt., 57; 1 Arch. Pr., 259; 2 Comst., 451.)

The statute makes it the duty of the Sheriff, upon the receipt of any execution, to indorse thereon the year, month, day and hour of the day when he received the same. (3 R. S., 5th ed., 643, § 10.)

Section 14 provides that "if there be several executions issued out of a Court of record against the same defendant, that which shall have been first delivered to an officer to be executed shall have preference, notwithstanding a levy may be first made under another execution;" * * and by section 15 it is further provided that "if there be one or more executions, and one or *more attachments*, against the property of the same defendant, or if there be *several attachments*, the same rule prescribed in the last section shall prevail in determining the preference of such executions or attachments." (2 Comst., 451.)

Any other rule or practice would necessarily lead to confusion, and possibly might produce collusion and bad faith. (16 Mass., 319, 322.)

Previous to the Code there were, as now, the attachment for the benefit of creditors generally, (under the absent, concealed and non-resident debtor act,) and for the specific benefit of the pursuing creditor, by virtue of the non-imprisonment act, &c.

The case of *Grant v. Shaw*, (16 Mass., 341,) cited in the Court below, was a case in which the defendant, at the time he was first summoned as trustee, had no property or interest in any property belonging to the debtor. He had expressly declined to accept the shipment, although the bills of lading had been sent to him: having refused acceptance and payment of the draft drawn thereon, the bills had been returned to the debtor. The plaintiff, after the return of the bills of lading, and the receipt of the goods by the defendant, again summoned him, but not until other creditors had served him with their processes.

1 *Id.*, p. 344.

It is quite evident, from the statement of the case, that the facts are dissimilar to the case under consideration.

The Court, PARKER, J., said "that the defendant was not trustee until he had accepted the consignment and received the goods: until then it rested in contingency whether he would be a debtor of the consignors or not." Had the debtor accepted the bill when presented, there could have been no question.

The statutes of Massachusetts provide that the garnishee cannot be attached, *inter alia*, 4th, by reason of any money or other thing due from him to the defendant, unless, at the time of the service of the writ on him, due absolutely and without depending on any contingency. (R. S., Mass., 1836, pp. 648, 651.)

An examination of the statutes did not enable me to find a provision similar to that in our State relative to the priority of executions and attachments, and I believe none exists.

I am clearly of the opinion that, as between the two attaching creditors—and the contest is confined to them—the attachment first delivered to the Sheriff had priority, and that the Court below erred in giving preference and awarding judgment in favor of the latter.

The judgment should be reversed, and a new trial ordered.

HOFFMAN, J. (The opinion, after discussing the evidence in relation to the state of the accounts between Perry and Albert Lewis, on the 6th of April, 1854, and the value of the property then in Perry's hands belonging to Lewis, proceeds as follows:)

The first important question is, whether an attachment will bind goods received by a consignee, subsequent to its service, when that consignee had, at the time of service of the attachment, the bill of lading in his hands, with advise of the consignment, the goods being out of the county, but on their passage from a foreign place. And this question arises as between such attaching creditor, and a subsequent one, attaching after the goods had arrived within the county, and when they or their avails were in the consignee's hands.

The answer to this question in the affirmative would dispense with the necessity of examining any other point and decide the case in favor of the appellant. I think, however, that this simple and unmixed question cannot be so answered.

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The 227th section of the Code provides, that a plaintiff may have the property of the defendant attached in the manner prescribed as a security for the satisfaction of such judgment as may be recovered by the plaintiff.

By section 231, the warrant is to be directed to the Sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand. Several warrants may be issued, at the same time, to the Sheriffs of different counties.

So by section 234, all property in this State of a defendant is liable to be attached and levied upon, and sold to satisfy the judgment.

Thus, under the Code, the property which may be attached is, first, property as defined therein; and next, that property when found in the State. If in the State, then the warrant must go to the Sheriff of the county in which it is found.

Thus the question is reduced to this, was the bill of lading in Perry's hands, property within the meaning of the Code? If it was, then it was within the county of the Sheriff of New York.

The definition of property, in section 464 of the Code is, that it includes property, real and personal, and the definition of personal property, is, "money, goods, chattels, things in action and evidences of debt."

It seems impossible to understand how a bill of lading, after it is in the hands of the consignee, is a thing in action belonging to the consignor named in it, or an evidence of a debt owing to him. Its delivery is a symbolical transfer to the consignee of the property and of a right of action against the carrier. It contains no evidence that the consignee is indebted to the consignor.

The two cases, in Massachusetts, of *Grant v. Shaw*, (16 Mass., 341,) and *Andrews v. Ludlow*, (5 Pick., 28,) are exactly in point, unless there exists a distinction upon any peculiar different provisions in the statutes of that State.

The 24th section of the revised act of 1836, (ch. 90, p. 549, Laws of Mass.,) provides, that all goods and chattels that are liable to be taken in execution may be attached and held as security, except such as from their nature or situation have been

considered as exempt from attachment, according to the principles of the common law, as adopted and practised in this State.

By the 19th section of chapter 97, title III, part III, page 589. "All chattels, real or personal, and all other goods that are by the common law liable to be taken in execution," may be taken and sold thereon, with certain exceptions.

It appears to me, that there is nothing in the statutes of Massachusetts, differing from our own definition of property, which may give rise to any doubt of the pertinency of the cases referred to, unless it be that a bill of lading is a chose in action, or evidence of a debt belonging to the consignor. This, I have before stated, does not seem to be a tenable proposition.

The case of *Grant v. Shaw*, decides expressly, that one who has received a bill of lading and invoice of goods consigned to him cannot be charged as Trustee of the consignor until the goods have arrived, and the consignment has been accepted. An attachment laid when the bill of lading only was on hand, was superseded by a subsequent attachment laid after the goods had arrived.

2. But the question as presented upon the peculiar facts of this case is different, and of no little interest and concern in this mercantile community. When the attachment of the appellants was served on the 6th of April, Perry had on hand an aggregate of goods, notes given for goods, and bills of lading representing goods on the way to him, and subsequently received, more than enough to discharge all his demand, including immature acceptances, and to leave a balance equal to the amount claimed by these attaching creditors. Again, the remaining goods, and the unpaid notes, then on hand, exceeded the amount of the demand of the appellants.

It is stated as a rule of law, that the attachment may be defeated by the lien of the garnishee upon the goods of the defendant, provided it be to the full amount of the value of the goods attached. If it be not to the full extent of the value, then the judgment is taken for the goods subject to the garnishee's lien, which must be ascertained from the garnishee or at the trial. (Locke on Attachment, 57.) He cites *Giles v. Nathan*, (*infra*), and *Bohun's Privileges of London*, 270.

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In *Giles v. Nathan*, (5 Taunt., 558,) cited by Mr. Locke, it was held that the property in a cargo for which the master had signed bills of lading might be transferred by delivery, without the indorsement of the bills of lading. The title would be subject to the claim of a *bona fide* indorsee of the bill of lading. But whether such property passed or not, Nothan, the consignee, had a lien upon the cargo for advances, and no creditor of the owner could attach it, or the produce of it, without discharging such lien. Without doing this, Levin himself (the owner) could not have received it, and they who attached the property as belonging to Levin, could not have a larger right than he possessed before the attachment. Supposing, therefore, that in the interval between the delivery of the cargo and the indorsement of the bill of lading, Nothan had a mere lien upon it, still it could not be attached as the property of Levin without discharging it from the lien.

In *Curtis v. Norris*, (8 Pick., 280,) an engagement to pay was held enough to prevent the attachment from affecting more than the surplus of goods in the garnishee's hands.

In *The Bank of South Carolina v. Levy*, (1 McMullan, 430,) it was decided that a garnishee, to warrant the retention of goods on hand, need not prove that he was entitled to bring an action. It would be sufficient if his outstanding liabilities exceeded the amount of funds. They gave him a special property superior in its nature.

And in *Nolan v. Crook*, (5 Humph., 312,) an attachment was served when the garnishee was in advance for an actual cash balance, and was then under liabilities which he paid before the hearing of the cause. He was allowed for both, before the attaching creditor could come in.

I apprehend that the law is that a factor or consignee, such as Perry was in this case, could sustain his lien for his own unpaid acceptances against an attaching creditor. (*Black v. Zacharie & Co.*, 3 How. U. S. R., p. 483.) Yet there is some authority to the contrary. (See *Nelson v. Martin*, cited Locke on Attachment, 57, note; *Taylor v. Gardiner*, cited by Mr. Sargeant, as decided by Judge WASHINGTON, C. C. U. S., January, 1811, on Attachments, 103; 2 Wash. C. C. R., 686.)

But the lien, in this point of view, may be regarded as eventual and conditional, leaving the consignee a right to hold and resort to existing funds for reimbursement when he pays his own liabilities. The argument that the actual property in the notes was in Lewis, thus receives some confirmation.

The property in all the goods comprised in the bills of lading passed for many purposes to Perry, by his possession of such bills, coupled with his being in advance, and passed to him before the goods themselves had arrived. (*Allen v. Williams*, 12 Pick., 297; see further *Anderson v. Clark*, 2 Bing., 20; *Haillie v. Smith*, 1 Bos. & Pull., 518; *Byans v. Mix*, 4 Mees. & Welsb., 792; *Brownell v. Carnley*, 3 Duer, 9.)

This property, or right in property, extended to all the goods indiscriminately. Although in point of fact there was a property in more goods represented by the bills of lading than the amount of his demand, yet neither Lewis nor any one under him could claim a right to separate any particular parcel and withdraw it from Perry's hands without payment of the balance due him.

The correlative right and interest seems necessarily to have existed in Lewis. His remaining interest extended on the 6th of April as much to the goods unsold, and to the notes unpaid for goods sold, as to the goods represented by the bills of lading, and in the course of transportation. If so, there was actual property in New York in Perry's hands, which the attachment could fasten upon.

To repeat, Perry had, on the 6th of April, a heavy debt owing him; he had some goods on hand, and notes taken on previous sales to an amount exceeding \$8,000; he had bills of lading made in his name by the owner, comprising property which, with the goods and notes above mentioned, exceeded in value his demand by over \$8,000.

Why was not Lewis' interest in the excess of this property, applicable to the aggregate property; why not as much applicable to the unpaid notes then on hand, as to the goods in transition, and subsequently received?

In considering the cases above cited, and the principle they appear to involve, it seems to me more accurate to say, that the right of a consignee in advance for his consignor, to property on

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hand or to a bill of lading made in his name, is a qualified property commensurate with and to support his lien, and no more; that strictly and in legal precision of language, the consignor is the owner. The qualified property enables the consignee to sue others for interfering with the goods, enables him to compel a delivery, or to support a claim for damages, and to defeat a claim of the shipper to stop *in transitu*. Still it is a special property, an ownership as lien holder, and nothing more. It is not absolute, it leaves the direct title, and something of interest in the consignor. A lien, in its general sense, is the right to retain the property of another to answer a demand. (Bouvier Law Dict., tit. Lien; *Peck v. Jenness*, 7 How. U. S. R., 612.) The reasoning of the Court in *Brownell v. Carnley*, (3 Duer, 9,) appears to me to sustain this view.

The 32d section of the statute of Massachusetts (ch. 90, part III, p. 550, ed. of 1836) provides that if the estate that is attached (real property) is subject to a mortgage or other incumbrance, and the mortgage is redeemed, or the incumbrance removed before the levy of the execution, the attachment shall hold the premises discharged of the mortgage or incumbrance, and the execution may be levied with the same effect as if the mortgage or other incumbrance had never existed.

I may also advert to the cases of *Scott v. Whittemore*, (7 Fost. R., 309,) and *Hill v. Wiggin*. (11 Fost., 300.) In these it has been held that where property in the hands of a mortgagee was attached, no one but the mortgagee himself could make an objection as to the right of property being in the mortgagor. The former case was a mortgage of personal property. "The mortgagee may or may not insist on his rights as mortgagee, and thus avoid the attachment. Until he does so elect, the attachment remains valid, though defeasible."

Again, it appears to be a well settled general rule, that property which is subject to execution, is liable to attachment. (*Handy v. Dobbin*, 12 John. R., 220.)

"Property" may be taken under the attachment. Its definition by the Code has been before stated. An execution may be against the property of the judgment debtor (§ 286) and the *fi. fa.* is to direct satisfaction first out of his personal property, and if enough cannot be found, then out of the real property. It

seems a very just inference that by the Code, what may be seized upon execution may be attached.

Now, by the 20th section of the act "of executions against property" (2 R. S., 366,) when goods or chattels shall be pledged for the payment of money, or for the performance of any contract or agreement, the right and interest in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

It is insisted on behalf of the defendants, White, Warner & White, that the provisions of the statute respecting executions (2 R. S., 365, §§ 13-15,) apply to the present case.

By these enactments, executions bind from the time of the delivery. If there are several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an officer to be executed, shall have preference notwithstanding a levy first made under another execution; but if a levy and sale has been made under the subsequent execution before an actual levy under the execution first delivered, the goods shall not be levied upon or sold under such first execution. Then the 15th section provides that if there be one or more executions and one or more attachments against the property of the same defendant, or if there be several attachments, the same rule prescribed in the last section shall prevail in determining the preference of such execution or attachment.

By the 16th section, any execution or attachment issued out of a Court, not of record, if actually levied, shall have preference over any other execution issued out of any Court, whether of record or not, which shall not have been previously levied.

The sale under the subsequent execution is rendered valid. The purchaser's title shall not be defeated by a future levy and sale under the senior execution. But it is said that in making a disposition of the proceeds on such sale, the Sheriff must be governed by the priority in the delivery of the executions to him, unless such prior executions have for some reason become dormant as to the subsequent ones. (*Peck v. Tiffany*, 2 Comst., 451.)

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The revisers, in their note to these provisions, (vol. 3, p. 727,) state that they are conformable to 4 Cowen, 411. There a *fi. fa.* first delivered to the Sheriff took preference of an attachment levied before the *fi. fa.* was levied. *Lambert v. Paulding*, (18 John. R., 811,) was relied upon as decisive. The attachment was from a Justice.

Ray v. Harcourt, (19 Wend., 495,) was decided under the 16th section of the act. A levy was made by plaintiff, a constable, on the 5th of August, 1834, by virtue of three attachments issued by a Justice of the Peace against the property of Clow. The Sheriff of the county of Ulster had received an execution, and had taken some steps towards a levy on the 4th of August, which was held insufficient as to the property in question. The attachments prevailed.

The provisions referred to can scarcely apply to attachments under the absent and absconding debtor act, found in the Revised Statutes of 1830. Those proceedings enured to the equal benefit of all the creditors who might come in. Attachments issued under that act, could not be discontinued without time being given to other creditors to come in. (*In the Matter of Bunch*, 9 Wend., 473.)

But there was a series of statutes under which attachments, similar to those of the Code, issued, particularly on proceedings in Justices' Courts. (1 R. L., 1813, p. 396; Laws of 1824, ch. 238, §§ 23, 24.) Under these provisions it has been held that the constable, under an attachment, could take any goods and chattels which could be levied upon by execution. (*Handy v. Dobbin*, 12 John. R., 220.) That the lien created by an attachment under the act, (session 31, ch. 204, § 21; 1 R. L., 1813, p. 398, § 23,) when duly served, was paramount to a subsequent execution or attachment. The lien would expire if the creditor did not prosecute his suit to judgment and execution with due diligence. (*Van Loan v. Kline*, 10 John. R., 129; *Sterling v. Welcome*, 20 Wend., 238.)

To attachments of this character, the provisions in the enactment as to executions may well apply.

But a difficulty exists in understanding how these enactments of 1830 can apply to the attachments under the Code of 1848, without special provision making them applicable.

The 232d section referred to, does not meet the case. The Sheriff is to proceed in the manner required by law in cases of attachments against absent debtors. It prescribes his course of action merely.

The 471st section of the Code provides that the second part of that act shall not affect "any existing statutory provisions relating to actions not inconsistent with this act, and in substance applicable to the actions hereby provided."

The enactment, then, of the Revised Statutes before mentioned, remains in force, but the question still is, has that enactment been made applicable to attachments under the Code.

But if these provisions can in any way be treated as prevailing under the Code, yet it seems clear that if there is no property in the hands of the party, which is the subject of an attachment at the time of notice served, property so subject, coming afterwards to hand, is not affected. If, then, another attachment is levied it must prevail. An attachment takes its effect, not from delivery to the Sheriff, but from its service.

The ground, therefore, upon which I place my judgment in the case, is that before stated, of an actual sufficient attachment of leviable property subject to the lien of Perry, which he alone had a right to say, displaced the effect of the attachment, and as he has been paid the amount of his lien, that property has been left substantially bound.

PIERREPONT, J., concurred in the conclusion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

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SAMUEL H. HARTSHORNE, Plaintiff and Appellant, v. THE UNION MUTUAL INSURANCE COMPANY, Defendants and Respondents.

The defendants, an Insurance Company located in New York, executed and delivered to J. Day & Co., of Apalachicola, Florida, a Marine Policy, being in form a Cargo Policy, numbered 784,) by which they in terms, "on account of whom it may concern, to cover only property which may be indorsed hereon, by said J. Day & Co., loss, if any, payable to the parties named in the certificate granted by said J. Day & Co., and subject to conditions contained therein, and not inconsistent with the terms of this Policy, do make insurance, * * lost or not lost, at and from ports and places to ports and places, on cotton," &c. \$250,000 was written on the margin of the Policy as the sum insured. With this Policy the defendants delivered to J. Day & Co. blank certificates, to be issued to persons who might contract for insurance under the Policy; which certificates state that the person named in them, respectively, is insured by the defendants; and they also delivered to J. Day & Co. a letter of instructions, which states, *inter alia*, that said certificates are each of them considered by the defendants "as representing a Policy issued by the Company itself."

November 14, 1853, the defendants, by a written certificate of that date, extended the sum insured by Policy No. 784, an additional \$250,000. On the 28th of October, 1853, the defendants issued a further policy, (numbered 993,) for \$250,000 to J. Day & Co., in form like that numbered 784.

J. Day & Co. pasted the Policy No. 784 in a large book, (called their Policy Book,) entered in it the substance of each certificate issued by them, and the fact and date of issuing it, and also the aforesaid certificate of renewal of Policy No. 784, and the further Policy No. 993. The risks attaching during each month under the certificates, as these amounts were ascertained, were entered in said Policy Book, and numbered consecutively as entered, in a column in which specific risks were also entered and numbered as entered.

On the 15th of November, 1852, J. Day & Co. issued to the plaintiff one of said certificates, indefinite as to amount, thereby insuring, under Policy No. 784, cotton to be shipped by persons, and at and from places named therein, consigned to the plaintiff. This certificate was renewed November 15, 1853, by an indorsement made thereon by J. Day & Co., (and entered in said Policy Book,) continuing the insurance until July 1, 1854. The cotton in question, which was covered by the terms and embraced within the insurance stipulated by the certificate issued to the plaintiff, was shipped on the 1st and 2d of February, 1854, and on the 3d was totally lost by the perils insured against. Early in February, 1854, it was ascertained that all risks taken from the commencement of the business, including specific risks,

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exceeded \$750,000 in the aggregate prior to the time the cotton in question was shipped. This suit was brought to recover the value of the cotton shipped February 1 and 2, 1854, and the complaint was dismissed, on the grounds that J. Day & Co. could not make valid contracts exceeding \$750,000 in the aggregate, and that when the risks actually taken had reached that sum, all certificates of insurance previously issued became inoperative and void. On appeal it was *held*:

1. That the certificate so issued to the plaintiff was the contract of the defendants, and obligatory from the time of its delivery.
2. That such certificate covered the cotton in question.
3. That, as between the plaintiff and third persons subsequently insured, whether insured under similar certificates issued, or upon specific risks taken subsequent to the issuing of the plaintiff's certificate, the plaintiff's contract, being first in point of time, gives him priority of right, and that he is to be protected in preference to them, even if it be held that J. Day & Co. could not bind the defendants for sums exceeding \$750,000 in the aggregate. That J. Day & Co. having, by the certificate issued to the plaintiff, insured all cotton described therein to be thereafter shipped to him, could not deprive him of the benefit of that insurance by subsequently insuring others.
4. That, without deciding the question whether J. Day & Co. could make valid contracts of insurance for sums exceeding \$750,000 in the aggregate, the judgment should be reversed and a new trial granted.

(Before BOSWORTH, Ch. J., and WOODRUFF and MONCRIEF, J. J.)

Heard, June 11; decided, December 31, 1859.

THIS is an appeal by the plaintiff from a judgment dismissing his complaint. The action was tried before Mr. Justice HOFFMAN without a jury, in October, 1855. It is brought to recover for a total loss upon a contract of insurance alleged to have been made between the plaintiff and the defendants on the 15th of November, 1853, and which, by its terms, was to continue in force until July, 1854. The loss in question occurred early in February, 1854, and there is no question as to the fact of a loss or of its amount. The main question is, whether the property so lost was in fact insured by the defendants.

The contract of insurance was made in Apalachicola, Florida, by J. Day & Co., as agents of the defendants. The powers of J. Day & Co., a firm doing business at Apalachicola, arose in this wise:

The defendants executed and delivered to J. Day & Co., a Cargo Policy, (No. 784,) dated October 27, 1852, in favor of J. Day & Co. for \$250,000, in terms, "on account of whom it may

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concern, to cover only property which may be indorsed hereon by J. Day & Co., loss, if any, payable to the persons named in the certificates granted by said J. Day & Co., and subject to conditions contained therein, and not inconsistent with the terms of this Policy."

By the terms of this Policy, the defendants make insurance "at and from ports and places to ports and places, on cotton," * * and "upon all kinds of lawful goods and merchandises laden or to be laden on board any good vessel or vessels, steamer or steamers," &c. The premiums to be at the same rates as charged by other good companies or agencies, to be governed as near as may be by the tariff of premiums furnished with such Policy to J. Day & Co., "the premiums on risks to be fixed at the time of indorsement, and such clauses to apply, as the Company may insert, as the risks are successively reported." An indorsement on the Policy declares that "this Policy is to be deemed continuous unless otherwise directed by either party, thirty days' notice being given to the *assured*, to enable risks which had already attached previous to the receipt of notice by J. Day & Co. to terminate."

The defendants delivered with this Policy, to J. Day & Co., a letter of instructions and blank certificates, to be filled up by J. Day & Co., and to be delivered by them to persons whom they might agree to insure under the Policy. The Policy itself J. Day & Co. pasted in a book, in which book they entered, under correct dates, the fact of their having granted insurance and certificates to the several persons with whom they subsequently made contracts of insurance.

On the 15th of November, 1852, the plaintiff applied to J. Day & Co., as such agents, for insurance, and J. Day & Co. signed and delivered to him one of the certificates, and at the same time indorsed on Policy (No. 784) by entering in the book in which it was pasted, the following, viz. :

"Certificate granted to S. H. Hartshorne to cover all cotton shipped per good steamboats, from points on the Chattahoochee river, by or for account of the following parties, and consigned to S. H. Hartshorne, valuation per bale annexed to each name. Fire risk at Apalachicola three days after landing."

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Then follow the names of ten persons or firms who were to so ship cotton, and against the name of each of said persons was the name of the place from which he was to ship and the agreed valuation of each bale he might ship.

Having made this indorsement on the Policy, J. Day & Co. filled up and signed one of the blank certificates furnished to them by the defendants, and delivered it to the plaintiff. It is in these words:

"UNION MUTUAL INSURANCE COMPANY OF N. Y.

"F. S. LATHROP, President.

"JNO. S. TAPPAN, Vice-President.

"FERDINAND STAGG, Secretary.

"*Certificate No. 1.*

"APALACHICOLA, Nov. 15, 1852.

"Entered this day on Policy No. 784, issued by the Union Mutual Insurance Company, of the city of New York, sundry amounts, per endorsements made in books accompanying this certificate, by J. Day & Co., on account of sundry persons whose names appear on book, payable in case of loss to S. H. Hartshorne, on cotton shipped per good steamboats from points on the Chattahoochee river to Apalachicola, and consigned to S. H. Hartshorne, valued at, per indorsements made in book by J. Day & Co., on board the . . . , . . . master, at and from . . . to . . . ; time of sailing . . . ; bills of lading dated . . . The said S. H. Hartshorne, therefore, *is insured* by the said Union Mutual Insurance Company, lost or not lost, for the said sum of, per indorsement, dollars as above.

"Binding.

J. DAY & Co."

In the letter of instructions accompanying the Policy and certificates, when delivered to J. Day & Co., the defendants say: "These Policies are granted in the form presented, for the purpose of enabling you to take risks for other parties under the same, and the certificates are to be used as evidence for the assured that the risks described by them are covered by the Policy in your hands, and are considered by us, in fact, as representing a Policy issued by the Company itself, subject to all the conditions of the same, and in case of loss, payable in like manner."

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According to the course of business, the plaintiff's consignors of cotton shipped it on steamers at the points on the Chattahoochee river named in the certificate, consigned to him; and as a general thing information of the fact of shipment could not be received by the plaintiff before the arrival of the cotton, as the same steamer which carried the cotton, also carried the mail containing advices of the shipment.

The certificate granted to the plaintiff was pasted in a small book which he kept, and as each cargo arrived, he entered in this book the date of such arrival, the quantity, and by whom shipped; and at the end of each month presented this book to J. Day & Co., whereupon the amount payable for premiums was ascertained and then or soon thereafter paid. The amount of property thus ascertained to have been at risk during the month, was then entered by J. Day & Co., as of that date in their Policy Book, that is, in the book in which Policy (No. 784) was pasted.

This course was pursued with respect to every person to whom J. Day & Co. issued one of these certificates. And these certificates were treated as open and continuing Policies, covering all goods shipped thereafter, from time to time, answering the description contained in the certificates. J. Day & Co. also took specific risks, and these were entered in their said Policy Book under the dates when they were respectively taken.

By the 14th of February, 1853, it was ascertained that \$250,000, in the aggregate, had been at risk under Policy (No. 784,) and the defendants sent to J. Day & Co. a paper reading thus:

"MARINE.

"OFFICE OF THE UNION MUTUAL INSURANCE COMPANY.

"NEW YORK, February 14, 1853.

"An additional sum of \$250,000 is hereby granted upon Policy No. 784, issued to J. Day & Co., of Apalachicola, subject to the same terms and conditions as the original insurance under our letter of instructions.

"JNO. S. TAPPAN, *Vice-Pres't.*

"FERDINAND STAGG, *Sec'y.*"

J. Day & Co. pasted this renewal in their said Policy Book, and continued the business of insuring as before.

On the 28th of October, 1853, the defendants issued and delivered to J. Day & Co. a Cargo Policy (numbered 993) for \$250,000, in the same form as the first, delivered it to one of the firm then in New York, who took it to Apalachicola, arriving there about the 20th of November. The fact of its having been issued was communicated by letter, which reached Apalachicola at an earlier date. The Policy was pasted in the same book as the first, and J. Day continued to insure as before.

On the 15th of November, 1853, J. Day & Co. indorsed on the plaintiff's said certificate (of November 15, 1852,) as follows:

"The foregoing Policy is hereby renewed to cover all cottons as per the body of the Policy from the 15th of November, 1853, to 1st July, 1854.

"J. DAY & Co.

"APALACHICOLA, 15 Nov., 1853.

"See parties' names in book annexed."

At the same date they entered in their Policy Book the fact of having granted this renewal.

Early in February, 1854, it was ascertained that all the property which had been at risk from the commencement of the business, under the certificates which had been granted, including the specific risks taken, exceeded \$750,000; the aggregate sum named in the two Policies and the extension of the first. The cotton in question was shipped on the 1st and 2d of February, 1854, on the steamer Alabama, and on the 3d the vessel and cargo were wholly consumed by fire. It is to recover for that cotton, that this action is brought.

The defendants insist that J. Day & Co. had no power to make them insurers for more than \$750,000 in the aggregate.

That as between the persons to whom certificates of insurance had been granted, those whose property was first put at risk had the priority of right without regard to the time when their insurance was effected; and that when risks amounting in all to \$750,000 had been ascertained and indorsed on the Policy, the powers of J. Day & Co. were exhausted, and these outstanding certificates became thenceforth inoperative.

It appeared that before the property in question was shipped, there had been over \$750,000, in the aggregate, at risk.

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It was held at special term that J. Day & Co. had no authority to make the defendants insurers for more than \$750,000 in the aggregate; that as this limit was reached before the cotton in question was shipped, their powers were exhausted, and the plaintiff consequently was from that time uninsured by the defendants; that the plaintiff's contract of insurance could not be treated as existing anterior to the 1st of February, 1854, and binding for the future; that on that day J. Day & Co. had no authority to make such a contract, and therefore the defendants were not liable for the cotton in question, and the plaintiff's complaint was dismissed.

The decisions of the Judge were duly excepted to. It did not appear from the facts as found, whether \$750,000 of risks, in the aggregate, had attached under the certificate issued to the plaintiff from the time of its renewal, and under like certificates of a prior date including specific risks, prior to shipping the cotton in question. Some portions of the correspondence between the defendants and J. Day & Co., and some additional facts, are stated in the opinion of the Court.

From the judgment entered on the decision, dismissing the plaintiff's complaint, the present appeal is taken.

Charles O'Connor and William Curtis Noyes, for appellants.

I. The relation between the defendants and J. Day & Co. was manifestly that of principal and agent. It is constantly so recognized in terms by the Company, and no other legal name can be given to it. The printed form of a Policy was used in framing the agent's letter of attorney or charter of authorization. And in respect to the alleged limit upon their power, the question is, did the use which was made of that printed form convey, with sufficient clearness to bind third persons, the idea that the agent's power to insure was limited to the sum of \$250,000 in the aggregate.

II. The letter of attorney does not express or convey any such idea. Its true reading is: We hereby authorize J. Day & Co., for us and in our name, to grant certificates of insurance, covering property to be indorsed hereon by J. Day & Co., at rates to be fixed by them, subject to conditions contained in such certificates, and not inconsistent with the terms of this form. This

was, in effect, writing a power of attorney to insure on the face of a pattern Policy, the terms of which, so far as applicable, were to be impliedly incorporated with all certificates issued under it. (*Devaux v. J. Anson*, 5 Bing. N. C., 519; Lord ELLENBOROUGH in *Robertson et al. v. French*, 4 East, 140, 141.)

III. If the Company and J. Day & Co. understood this \$250,000 to be a limit upon the aggregate amount of insurances to be granted by the latter, such understanding on their part would not bind or in any way affect the person insured. The insured did not so understand the paper, and they may lawfully claim the benefit of its true construction.

IV. The Company did not so understand it when the Policy was issued.

V. The Company & J. Day & Co. may possibly have understood this \$250,000 entry as a limit upon the power of the latter, binding them in like manner as private instructions bind an agent. They could not have had a clear conception that it bound certificate holders.

VI. It is impossible that the Company or J. Day & Co. could ever have had an intelligent and practical conception that such limit existed and could be enforced in the way now attempted against persons obtaining certificates from J. Day & Co. J. Day & Co. themselves issued the open certificates which were altogether indefinite in amount, and they knew that there was no other method in which the business could be done.

The Company had explicit notice that the business was done under such open certificates as early as January 27, 1853. Indeed, as insurers they are chargeable with notice of the course of trade; and, besides, it is to be presumed from the evidence that they were well acquainted with it. Insurers are chargeable with notice of the course of that trade in which the insurance is effected. (1 Phil. on Ins., §§ 119, 140, 141; *Eyre v. Marine Ins. Co.*, 5 Watts & Serg., 122, and cases therein cited; 8 Pet. R., 582.) Ignorance for so long a time of the business openly carried on by their agents in their name and for their account and profit, if it really existed, would have amounted to gross negligence on the part of the Company, and sufficient to charge them with constructive notice. (*Gansevoort v. Williams*, 14 Wend., 139, 140; *Williamson v. Brown*, 15 N. Y. R., 359.) In respect to this sup-

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posed limitation of power, the contracts of insurance, evidenced by these open certificates, must take effect at the time of their issue. As contracts of insurance, they could not have their inception at the time when the particulars were given, for that was always after the risk was known to have terminated.

As contracts of insurance they could not have their inception at the time of the commencement of the risk, *i. e.*, the loading of the goods on board; for that construction would produce the utmost uncertainty and confusion. No certificate holder would ever know whether he was insured or not until an account was taken of all the doings of all the certificate holders. The agents would never know when the limit was reached. One applying for insurance would have no means of ascertaining whether or not the limit was already reached. The very first taker of a certificate might have his insurance superseded by a subsequently insured person procuring his goods to be first shipped. This construction might lead in any case to the singular result attained in this. A contract of insurance, perfectly valid when made, would be supplanted by the subsequent act of the insurer's agent.

Instead of its being a far-fetched and indeed unwarrantable deduction from the peculiar structure of an awkward and inartificial document, if it had been plainly and directly expressed that the agent's power of insuring was limited to the amount of \$250,000 in the aggregate, the absurd consequences to which it must lead, in such a business as that under consideration, would prove that the contracting parties did not intend the very thing they said. When such stipulations are made, they are treated as mutual mistakes and disregarded. (1 Phil. on Ins., § 6, and note; *id.*, §§ 133, 135, 137, 125; 1 Greenl. Ev., 278; *Alsager v. St. Katherine's Dock Co.*, 14 Mees. & Welsb., 799; *Kemble v. Farren*, 6 Bing., 141; 6 House of Lords' Cas., 139.)

VII. There can be no pretense that the alleged limit was exceeded on the 15th November, 1853, when the plaintiff obtained his certificate. The defendants' agents could not, by subsequent insurances, divest the plaintiff of his already established right; and, consequently, the inquiry at the trial as to the state of the account between J. Day & Co. and their power of attorney on the 1st February, 1854, was altogether irrelevant.

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VIII. If such an account could be taken, the sums underwritten by J. Day & Co., for themselves or their correspondents, should be deducted. They had no authority to grant such insurances. (*N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 4 Kern., 85.)

IX. The case made by the complaint was fully proved. The defendants should have been decreed to deliver a valid Policy of insurance, and to pay the loss, with interest and costs; consequently the judgment of the Special Term should be reversed. (*Perkins v. Wash. Ins. Co.*, 4 Cow., 645; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. R., 408; *Taylor v. Men. Fire Ins. Co.*, 9 How. U. S. R., 390; *Union Mutual Ins. Co. v. Commercial Mutual Ins. Co.*, 8 Law R., N. S., 610; *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb., 69.)

Wm. M. Evarts, for respondents.

I. The defendants placed in the hands of J. Day & Co. an open Policy to the amount of \$250,000. This Policy was open to take in such specific risks, conformed to its terms, as from time to time the assured, by agreement with J. Day & Co. therefor, should procure to be indorsed thereon.

1. This Policy gave an opportunity of insurance, in the aggregate, to its limit in amount, and not beyond. The sum once filled, there was no room for further insurance under the Policy.

2. No actual contract of insurance arose under this Policy until the assured, the subject of insurance and the premium, were ascertained, and the risk thus insured was indorsed on the Policy.

3. The Policy, as placed in the hands of J. Day & Co., differed in no respect from an open Policy for an equal sum issued to an assured by name, so far as respects the amount for which the defendants undertook to become insurers.

4. The only difference was, that instead of the assured being determined as a party to the Policy, J. Day & Co., named as the assured, were authorized to fill up the Policy with risks, conformed to its terms, for other and various parties.

II. There was no agency, or show, or credence of agency, to J. Day & Co. to effect insurance with defendants, beyond the

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faculty of admitting risks upon the Policy, according to its terms and within, in the aggregate, its amount.

The power of adjusting losses did not extend, or purport to extend, the power of insuring.

The furnishing by defendants, to J. Day & Co., of a tariff of premiums or of blanks, whether of certificates of insurance or of orders for payment of losses, has no significance on the point of authority to insure.

III. The Policy of insurance, the whole instrument by and upon which J. Day & Co. either could effect or assumed to effect insurance with the defendants, was exhibited to the plaintiff at the outset, and was fully understood by him.

IV. At and before the inception of the risk of the plaintiff, by this suit now sought to be indorsed upon one or the other Policy of the defendants, the insurance opened by the defendants in the name of J. Day & Co. for distribution to assured to be named, was fully taken up; the Policies being exhausted, there was no space or opportunity for a contract of insurance to arise upon the plaintiff's risk under them or either of them; beyond the Policies, J. Day & Co. had no authority and no show or pretense of authority.

1. If the Policy "993" be treated as an extension of the previous Policy, and constituting an unbroken line of insurance of which the risks in the order of entry formed a continuous series, (as they are numbered, in fact, on the book,) the whole aggregate of the Policies had been filled before this risk of the plaintiffs had its inception.

2. If the plaintiff seek to ascribe this risk to the first Policy, "784," as extended by the additional grant of \$250,000, that Policy and its extension had been exhausted before the inception of this risk.

V. The open certificate, so called, granted by J. Day & Co. to the plaintiff, purported to effect no insurance for the plaintiff, except as indorsements should be made upon the plaintiff's insurance book by J. Day & Co. under the described Policy (No. 784.)

1. No certificate granted by J. Day & Co. could entitle the plaintiff to insurance under the defendants' Policies beyond their amount, nor except in conformity with their terms.

2. The only construction of this open certificate, so called, which can help the plaintiff, would be an exclusive appropriation of the whole Policy to his risks by reason of the prior date of this open certificate, but not of his risks, as they from time to time became insurable and supplied a premium.

3. This construction is inadmissible: (1.) as unsupported by the language or purport of the certificate itself; (2.) as equivalent to a conversion of the Policy into a private Policy of the plaintiff, thus frustrating the whole plan and scheme of the intended insurance; (3.) as involving an absurd subjection of the defendants' interest to the plaintiff's occasions without consideration; (4.) as negated by the whole course of the business, as conducted by all parties with the knowledge of each.

4. The true purport of the open certificate, its design and office were to give the plaintiff the right to have his risks, proving conformable to the certificate and the Policy, indorsed upon the Policy, as they should severally have their inception. The contingency that the Policy might, at the inception of some future risk, be exhausted, and so not cover such future risk, was apparent, and necessarily was at the hazard of the plaintiff.

It is the ordinary hazard of the holder of an open Policy that shipments may be at risk, without timely advice, beyond the limit of his open Policy.

VI. The case is governed by well settled rules of the law of agency. The defendants have exercised every degree of caution in setting forth the true position of J. Day & Co. distinctly and unequivocally, and the plaintiff has been misled by no act or omission of defendants.

The loose method of transactions between plaintiff and J. Day & Co., was never made known to or countenanced by the defendants. (2 Duer on Ins., ch. xii, §§ 44-53.)

BY THE COURT—BOSWORTH, Ch. J. The primary and main object, if not the sole object, of confiding to J. Day & Co. the powers vested in them was, that third persons might obtain insurance upon cargoes by application to them, with like force and effect as upon an application to the defendants themselves; and that J. Day & Co. might execute and deliver to all persons, applying to and contracting with them as agents of the defendants,

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authentic evidence that such persons were insured by the defendants as effectually and absolutely as by a formal Policy issued by the defendants themselves, and were insured against the risks described in the certificates issued and delivered by J. Day & Co. to the persons thus insured.

The defendants' letter to J. Day & Co. of the 27th of October, 1852, states the object of the defendants in delivering the Marine and Fire Policies which it accompanied, and the use to be made of the certificates furnished therewith, and declares that "the certificates are to be used as evidence for the assured that the risks described by them are covered by the Policy in your" (J. Day & Co.'s) "hands, and are considered by us in fact as representing a Policy issued by the Company itself, subject to all the conditions of the same, and, in case of loss, payable in like manner."

This letter of instructions also states that "we" (the defendants) "have not named a limit in the Marine Policy, knowing the great difficulty you would have in fixing an amount with the parties for whom you would be called upon to insure; but it is our wish that you should not incur a liability for more than \$10,000 by any one first-class boat, nor more than \$5,000 by any other craft."

On the 15th of November, 1852, J. Day & Co., on being applied to, as such agents, by the plaintiff, for insurance, issued to the plaintiff a certificate signed by them, (the certificate being one which the defendants had furnished to J. Day & Co., to be signed and delivered by them as such agents,) which certificate declares that the plaintiff "is insured by the said Union Mutual Insurance Company" * * "on cotton shipped per good steamboats, from points on the Chattahoochee river to Apalachicola, and consigned to" the plaintiff, "valued at. . . ., per indorsements made in book by J. Day & Co., on board the. . . .,master, at and fromto. . . .; time of sailing. . . ., bills of lading dated. . . ."

On the back of this certificate, J. Day & Co., on the 15th of November, 1853, made and signed an indorsement in these words, viz.:

"The foregoing Policy is hereby renewed, to cover all cottons, as per the body of the Policy, from the 15th of November, 1853, to 1st July, 1854.

"APALACHICOLA, 15th Nov., 1853.

J. DAY & Co.

"See parties' names in book annexed."

This certificate, when received, was pasted in, or attached to, a book kept by the plaintiff, in which he entered the cargoes intended to be protected and covered by the certificate from time to time, when informed of the fact of cotton having been actually shipped, consigned to him, and he exhibited to J. Day & Co., monthly, such certificate and book and the entries therein made. The entries were made in pencil by the plaintiff in the first instance, and were written over by J. Day & Co., on being found to be correct. They, at the same time, entered in the book in which they had pasted Policy No. 784 the goods thus ascertained to have been at risk and the amount of premium payable for insurance thereon under the said certificate. At the time of issuing and delivering the said certificate to the plaintiff, they made an entry in their book in which they had pasted Policy No. 784, stating the grant of the said certificate, the purpose for which it had been issued, and also entered, at the time, the fact of its renewal from the 15th of November, 1853, to the 1st of July, 1854.

Was the said certificate a valid contract between the plaintiff and the defendants, at the moment it was issued and delivered by J. Day & Co. to the plaintiff? Could the latter, as a matter of right, recover upon and by reason of it for a loss of property described as insured by it, in a case in which no question could arise as to J. Day & Co. having insured to a larger amount in all than Policy No. 784 authorized?

By the terms of the Policy (No. 784,) it was "to cover only property which may be indorsed hereon by said J. Day & Co." It covers "all kinds of lawful goods," &c., "laden or to be laden" on board any good vessel or steamer, &c.

"The premiums on risks to be fixed at the time of indorsement; and such clauses to apply as the Company may insert, as the risks are *successively reported*."

"This Policy to be deemed continuous, unless otherwise directed by either party; thirty days' notice being given to the *assured* to enable risks which *had already attached previous to the receipt of notice by J. Day & Co. to terminate*."

If a Policy, in form like this one, had been issued directly by the defendants to the plaintiff, and such Policy had stated that it was "to cover only property which may be indorsed hereon by the President of the Union Mutual Insurance Company," and the

President of the Company, subsequent to its execution and delivery, had indorsed thereon, viz., "This is to cover all cotton shipped per good steamboats from points on the Chattahoochee river to Apalachicola, and consigned to S. H. Hartshorne," I think it would not be doubted that the Company would be liable for a loss of cotton coming within the description contained in such indorsement.

There was indorsed upon Policy No. 784, at the time the certificate of insurance was delivered to the plaintiff by J. Day & Co., the following entry, to which some modifications in the valuations appear to have been added at subsequent dates, viz.:

"Nov. 15, 1852. Certificate granted to S. H. Hartshorne, to cover all cotton shipped per good steamboats from points on the Chattahoochee river to Apalachicola, by or for account of the following parties, and consigned to S. H. Hartshorne: valuation per bale annexed to each name.

"Fire risk at Apalachicola three days after landing:

"W. T. Simpson from Eufaula, valued at \$50 per bale.

"Roberts & Locke, "	"	"	50	"	} From this date, Dec. 14th, the valuations of all cotton decreas- ed of \$45 per bale."
"J. M. Morrison, "	"	"	50	"	
"L. J. Leaird, "	"	"	45	"	
"L. F. Stow, "	"	"	50	"	
"D. Morris, " Georgetown, "			50	"	

"Harrison & Godwin, from Eufaula, valued at invoice.

"J. M. Hamilton & Co., " " " \$50 per bale.

"G. A. Roberts, " " " 45 "

"J. P. Adams, valuation at \$50 per bale—increased from December 14, 1853.

"Above reduced to \$45 per bale, from date of Feb. 4, 1854."

At the time of the renewal of the certificate held by Hartshorne on the 15th of November, 1853, there was indorsed on Policy (No. 784) by J. Day & Co., underneath the indorsement made thereon (on the 15th of November 1852,) the following, viz.:

"Nov. 15, 1853.

"The above certificate renewed from this date to 1st July, 1854.

"J. DAY & Co."

Thus, there was indorsed on the Policy, that "cotton" was insured by it under the certificate issued to the plaintiff; the names of the persons who were to ship it; the place where they resided; the name of the consignee; the voyage to be made; the class of steamers on which the property was to be shipped, and the per bale valuation of the cotton so insured.

"Property," viz.: cotton thus described and identified, was "indorsed hereon (on the Policy) by said J. Day & Co.," on the 15th of November, 1852, as insured by it; and the Policy in terms declares that the Policy is to "cover property which may be indorsed hereon by said J. Day & Co."

The certificate issued to the plaintiff, when read in connection with the indorsement thus made on the Policy, is very intelligible.

It reads thus: "Entered this date, on Policy (No. 784) issued by the Union Mutual Insurance Company of the city of New York, sundry amounts per indorsements made in book accompanying this certificate by J. Day & Co., on account of sundry parties whose names appear on book, payable in case of loss," &c., "on cotton shipped," &c. The "sundry parties" are the persons whose names were specified in the indorsement made on Policy No. 784, and which names were also written in the "book accompanying this certificate."

The Policy No. 784, the certificates and letter of instructions furnished with it by the defendants to J. Day & Co., when considered separately or together, indicate no intent of the defendants, that J. Day & Co. should not make contracts of insurance in this manner; nor do they furnish any warrant for saying that the indorsement which J. Day & Co. made on the 15th of November, 1852, on the Policy (No. 784) was not as definite and as full in its particulars as it was contemplated by the defendants they might have occasion to make, in transacting their business within the limits of the powers intended to be conferred.

The Policy (No. 784) insured goods "laden or to be laden," and the contract evidenced by the certificate by its reference to and embodiment of the provisions of Policy No. 784, as part of such contract, makes it a valid contract between the plaintiff and the defendants.

The letter of the 27th of October, 1852, states as a reason why no limit has been prescribed as to the amount of insurance which

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could be rightfully granted (upon cargo in any one boat, to any person or persons under the Marine Policy,) that the defendants knew "the great difficulty you" (J. Day & Co.) "would have in fixing an amount with the parties for whom you would be called upon to insure."

It appears, without contradiction, that for many years prior to the defendants conferring authority on J. Day & Co. to make contracts of insurance for them, and during all the time that such authority existed and was exercised, the course of business was, that the consignees of cotton residing at Apalachicola "insured the cotton shipped to them by parties residing in the interior and sending it by the rivers to that place; that from the want of rapid communication with the interior, (the mails being carried by steamboats,) it was impossible to know when the cotton was shipped, (at the time of shipping it,) as the cotton would frequently arrive before or with the advices of its shipment, and that therefore the practice was and had been during all that period," (some fifteen years,) "in reference to open Policies, to regard all cotton shipped under the open Policies as covered by them, although the details of the specific shipments were not entered on the Policies."

The defendants in their letter to J. Day & Co. of the 15th of January, 1853, say: "We notice quite a large amount under Policy No. 14, but presume it will go down the river by a number of boats, and that you have limited the amount by any one boat at one time, not to exceed \$10,000."

J. Day & Co., in their reply of the 27th of January, 1853, state that "it is very seldom that the amount of risk on any one steamer reaches over \$5,000 or \$6,000, by *all the parties* to whom we have given *open Policies*."

The defendants, in their letter to J. Day & Co. of the 14th of February, 1853, say: "If you can conveniently, we should be glad to have you specify in your returns the name and amount by each boat, and oblige," &c.

J. Day & Co. replied on the 26th of February, 1853, that: "It would be difficult to give the amount of risk on any one particular trip of any boat. We could give the amount by any one boat for each month very easily."

In answer to this, the defendants wrote to J. Day & Co. on the 7th of March, 1853, thus: We "can only say that we wish you to use caution in accepting the river risks, keeping the amount by any one boat as small as you can consistently, and scattering the fire risks as much as possible. If at any time you find the returns larger than prudence would dictate on the premiums, &c., we can get reinsurance done here on advice from you."

I think the defendants are chargeable with notice of the manner in which J. Day & Co. transacted business for them, and that there is nothing in it opposed to the apparent intent and expectations of the defendants in respect thereto at the time of employing them, as evidenced by the papers which they furnished to J. Day & Co. as constituting their authority and indicating the course they were to pursue.

If this be a correct view, then it follows that the certificate issued to the plaintiff by J. Day & Co. on the 15th of November, 1852, was from the time of issuing it a valid contract of insurance, and continued to be a valid and continuing contract, so long as by its terms, or by agreement between the parties, it continued in force.

All cotton of the description which it declares to be covered by it, is insured by it, and upon a loss occurring, the defendants are liable for it as the insurers.

If a valid contract, it could not be terminated by the mere fact that J. Day & Co., as the agents of the defendants, subsequently made contracts of insurance with other parties and issued certificates to them.

If under all the certificates issued, property was put at risk of a larger aggregate amount or value than they could make valid contracts to insure, and if for that reason some of such certificates must be rejected, as made without authority, or treated as having become inoperative, I do not see on what principle a second contract is to override and defeat a prior contract between the Company and other parties valid when made, and existing in full force when the second one was entered into.

The Judge at Special Term treated the contract between the plaintiff and the defendants as having been, in effect, made when the cotton in question was shipped. He says: "I consider the contract of insurance as to the cargo of the Alabama cannot be

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treated as in existence until this 1st day of February, 1854, at the earliest."

The cotton which was shipped by this boat was not at risk, it is true, until it was put on board. But a valid contract was made certainly as early as the 15th of November, 1853, that all cotton which the shippers of the cotton in question should ship between that date and the 1st of July, 1854, from the places named, consigned to the plaintiff, should be protected against the perils enumerated in Policy No. 784, and that the defendants would pay to the plaintiff the amount of any loss which should be suffered.

That fact was constructively known to every person to whom J. Day & Co. subsequently granted certificates, or with whom they made contracts of insurance, who is chargeable with notice of the indorsements made on the pattern Policy, by J. Day & Co., of the grant of certificates under it.

It seems to me, therefore, that, if any party is to be defeated of his insurance on the ground of there being an aggregate limit of risks beyond which J. Day & Co. could not bind the defendants, the one who obtained a certificate of insurance last took it at the hazard of its being inoperative by reason of the certificates previously granted, and the amount of property put at risk under them.

That he, as well as the Company, must recognize the rights of the holder of the certificate of insurance first granted—a certificate constituting a valid contract between the parties to it when made, and not to be avoided (if avoided at all) on the sole ground of a subsequent contract with himself in the same form, and of his individual acts under it.

I cannot understand on what principle a contract between A and B, valid in all respects, and under which both are at the time acting, and by which A, in such an event as has happened, is entitled to recover a certain sum of B, can be defeated or impaired by force of a subsequent contract between B and C, and anything C may do under it.

The plaintiff's contract is first in point of time, and he has precedence, therefore, in point of right.

If the aggregate limit of \$750,000 had not been reached at the time the property insured by the plaintiff was lost, I do not understand it to be intimated in the opinion delivered at Special Term that the plaintiff would not be entitled to recover. If he would

be, it would not be for the reason that any contract was made at the time the cotton in question was shipped; but his right to recover would rest on the grounds that the contract of the 15th of November, 1853, (treating the time of the renewal as its true date,) was a legal and valid contract of insurance, and that there had been a loss from the perils which it insured against. If there was not a valid contract of insurance from and after the time the certificate was delivered and renewed, then it follows that the plaintiff never had any property insured by force of his transactions with J. Day & Co.; for he never made any contract except such as the certificate granted and the Policy to which it refers express and create.

To hold that the certificate first granted is a valid contract of insurance, and is to be deemed continuous until terminated by notice from the Company, or by agreement of the parties, and to also hold that, while both parties are acting under it as a valid and subsisting contract, it must be treated as inoperative from the moment that J. Day & Co. ascertain that, under certificates subsequently granted in like form to others, over \$750,000 worth of property has been put at risk in such sense that property subsequently shipped will not be protected by it, would, as I think, disappoint the expectations and intentions which all parties to the contract must have had and acted upon at the time it was made.

Whether, on the occurrence of the fact that more than \$750,000 worth of property was at risk, the powers of J. Day & Co. had been exceeded in such wise that those who shipped under the certificates last granted could not recover in case of loss, is a question which it is unnecessary to decide now.

But, if any person thus insured is to be treated as uninsured on the mere ground that an aggregate limit was prescribed beyond which the defendants could not be bound by the acts of J. Day & Co., such persons are to be ascertained by taking the dates of the contracts to insure, in the inverse order of the times when they were severally made.

JEWETT, J., in *Truscott v. King*, (2 Seld., 157,) states that "the principle is well settled that a mortgage or judgment may be taken and held as security for future advances and responsibilities to the extent of it, when that forms a part of the original agreement between the parties; and the future advances will be covered

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by the mortgage or judgment in preference to the claim under a former intervening incumbrance, with notice of the agreement."

The report of that case does not disclose that any member of the Court dissented from that part of his opinion. If that be the rule, then it may be said in this case by the plaintiff, to every one whom the defendants subsequently insured through the agency of J. Day & Co., that you had notice by the indorsements made on the Policy, when you obtained insurance under it, that, by a valid contract, made on the 15th of November, 1853, I was insured from that date until the 1st of July, 1854, for all cotton that might be shipped, as described and provided in and by the indorsement then made on the Policy, between those periods. It was your folly, or at your own risk, that you relied upon a Policy that might become inoperative by reason of the aggregate risks under it and previous contracts of insurance exceeding \$750,000 in all, while your own property was exposed to peril.

It is very obvious that this mode of making contracts of insurance is ill adapted to protect parties at Apalachicola desiring insurance on property situated like that in question, and who must be insured, if at all, by open Policies by which property shipped after the granting them would be covered; especially as, in many instances, it could not be known that the Policy had attached to specific property until the voyage insured against had been performed.

If, in such a case, all property shipped after over \$750,000 in value was at risk would be uninsured, (although it was unknown to any one when the last shipments were made that such aggregate had been reached,) then it follows that those holding certificates would have no means of ascertaining, after the business had been prosecuted in this mode for a brief period of time, either by application to J. Day & Co. or otherwise, whether expected consignments, covered by the terms of the contracts made, would be protected or not.

And in case of shipments made at different ports on the day when the aggregate limit was thereby reached and exceeded, the rights of parties would depend on the hour or fraction of the hour at which such last shipments were made. And so, too, if this view be correct, J. Day & Co., by taking a definite risk which would fill up the supposed limit of \$750,000, on the morning the

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cotton in question was shipped and before it was shipped, would thereby cancel and annul the contract between the plaintiff and defendants, which contract, but for such act, would remain in full force, and protect the cotton in question.

It seems to us that the contract first made gives priority of right, if all the assured are not to be protected; and, as the adoption of that rule makes a new trial necessary, it would be out of place to attempt to settle, in this case, what rule must obtain between the defendants and those with whom they made contracts at a later date. If any case arises in which it shall be established that, by allowing the claims for losses of those who insured at a later period, the defendants will be held to have been liable for risks in the aggregate to an amount exceeding \$750,000, that will furnish the appropriate occasion to decide the question of the defendants' liability in such a contingency.

We think the judgment should be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

STEWART S. HAFF, (who prosecuted with JOHN LYON,) Plaintiff
and Respondent, *v.* BENJAMIN BLOSSOM and CHARLES W.
BLOSSOM, Defendants and Appellants.

Where the owners of property sell and deliver it to third persons by whom it is received and enjoyed under a written agreement signed by the vendors and vendees, and such agreement is, in form and terms, that the vendors and vendees "constitute and appoint B. and W. to appraise" the property, and "bind themselves each to the other to abide by their valuation of the same, at which" (the vendors) "agree to sell the same to" the vendees, and the latter "agree to buy the same" of the vendors; and in case B. and W. "should be unable to agree in their valuation, they shall select a disinterested party, as usual in such cases, to assist them in the appraisement;" and where B. and W. being unable to agree, selected a third person, and the three met together and examined the property, and two of them agreed upon a valuation, the vendors are entitled to recover the sum so agreed upon, although such third person was selected upon an agreement between him and B. and W. that he should fix the value and they would concur in it,

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provided that agreement was abandoned, and the three did in fact meet and examine the property together, with a view to determine its fair value, and the value so agreed upon was fixed in good faith, and expressed the honest judgment of the two who concurred in respect to it.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, December 7; decided, December 31, 1859.

THIS is an appeal by the defendants from a judgment in favor of the plaintiff, Haff, entered upon the verdict of a jury. The trial was had before BOSWORTH, Ch. J., and a jury, on the 7th of March, 1859. John Lyon and Stewart S. Haff are the plaintiffs upon the record; and Benjamin Blossom and Charles A. Blossom are the defendants.

The action was brought to recover the price of certain sheds sold and delivered by the plaintiffs to the defendants.

The plaintiffs, being the owners of certain sheds, entered into a written agreement with the defendants in these words, viz.:

"We hereby constitute and appoint James B. Barney and William S. Wright to appraise the sheds and fixtures now on the premises foot of Montague street, Brooklyn, known as Lyon & Haff's Naval Store Yard, and bind ourselves each to the other to abide by their valuation of the same, at which we, Lyon & Haff, agree to sell the same to Benjamin Blossom & Son; and we, Benjamin Blossom & Son, agree to buy the same of Lyon & Haff. It being hereby agreed that in case the appraisers named above should be unable to agree in their valuation, they shall select a third and disinterested party, as usual in such cases, to assist them in the appraisement.

"Witness our hands this 25th day of April, 1854.

"(Signed)

"BENJAMIN BLOSSOM & SON,

"LYON & HAFF."

The complaint sets forth the agreement, and alleges that Barney and Wright, being unable to agree upon a valuation, selected one Robert White to assist them in the said appraisement; that the three met and examined the property, and that Wright and White agreed that its value was \$2,250, and signed a written

certificate to that effect, dated August 21, 1854; that the defendants refuse to pay the plaintiffs the price so fixed, or any part thereof; and it prays judgment for \$2,250 and interest from August 21, 1854.

The defendants gave evidence tending to show that when White was selected to act, he was selected upon an agreement between Barney and Wright that he should fix the valuation, and that they should agree to it whatever it might be.

The plaintiffs also gave evidence tending to show that, as matter of fact, the three met together and examined the property with a view, by means of an actual examination, to agree upon the value, and that the sum agreed upon by Wright and White was fixed in good faith as a result which they believed to be just.

There was some evidence that when the three were last together Wright agreed to communicate to the plaintiffs a proposition then made by Barney, and to see him again in relation to it.

The defendants proved, under a supplemental answer which they had been allowed to file, that on the 29th of January, 1859, the defendants settled with Lyon, and paid him in full for his half interest in the present cause of action, and released him therefrom, it being part of such agreement that "Stewart S. Haff be permitted to proceed with said action, or settle the same as he may choose, as to one-half of the cause or claim on which said action is founded," &c

The Judge was requested to charge:

1. If, when the appraisers were last together, they separated agreeing to meet again, Wright and White had no power in the absence of Barney, or without notifying him of the time of meeting, to make an appraisal.

2. That Wright and Barney had no power to select White, and agree that his appraisal should govern, and if they did so, then there has been no valid appraisal, and the plaintiffs cannot recover.

3. That if the jury find that the appraisal was made in accordance with the terms of the agreement, that the jury are to find for one-half only of the appraisal with interest, in favor of the plaintiff Haff, and that they shall find for the defendants as against the plaintiff Lyon.

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4. That if Wright concurred with White, because he supposed that he was bound by the appraisal of White, then the appraisal is not binding.

The Judge then charged as follows:

"The plaintiffs are entitled to recover \$1,275, and interest from August 21st, 1854, or nothing.

"If Wright and Barney were unable to agree, and thereupon selected Robert White to assist them in the appraisement, and the three met together and examined the property, and White and Wright, as the result of the examination, and of the deliberation had by and between the three, united in and agreed upon the sum of \$2,550 as a fair and just valuation of the property, the plaintiffs are entitled to recover. But if *White* was selected by Wright and Barney to fix the value, and if Wright and Barney agreed that they would be bound by White's valuation, and so told him; and if he, acting under this selection, and for such purpose, fixed the sum of \$2,550 as the value, then he acted in a manner not authorized by the agreement of the 26th of April, 1854, and under powers which that paper did not authorize Barney and Wright to confer, and the appraisal signed by White and Wright is void, and there can be no recovery in this action."

(To this instruction the plaintiffs' counsel excepted.)

"The parties have a right to an appraisal made upon the honest effort of the three to fix a just valuation, based upon such information as they deemed useful in coming to a correct conclusion, and upon an interchange between them of the views which they severally thought should influence them in determining such value.

"But although the jury may be of the opinion that *White* was selected under an agreement or understanding between Wright and Barney, that he should determine the value, and they would be bound by his valuation, yet if the evidence satisfies you that the three afterwards met and examined the property with a view to and for the purpose of determining its value, and that the valuation of \$2,550 was finally assented to and agreed upon by Wright, because such, in his judgment, was a fair and just value of the property; and also, that such was the opinion and judgment of White, then the appraisal is valid, and the plaintiffs are entitled to recover."

(To this part of the charge the defendants' counsel then excepted.)

The Court declined to submit to the jury the proposition embraced in the first request, and to such refusal the defendants' counsel excepted.

The jury rendered a verdict against the defendants for \$1,681.11 in favor of plaintiff Haff.

The evidence material to the questions covered by the exceptions taken, is stated in the opinion of the Court

Judgment having been entered on the verdict, the defendants appealed from it to the General Term.

G. Dean, for appellants, (defendants.)

A. J. Willard, for respondent, (plaintiff.)

BY THE COURT—BOSWORTH, Ch. J. This action is brought to recover the value of certain sheds and fixtures sold and delivered by Lyon & Haff to the defendants. There is no controversy as to the fact of a sale and delivery of the property, or as to the terms of the contract. The sum or price to be paid was not agreed upon by the parties.

The contract of sale provided a mode of ascertaining the price to be paid, and if that has been ascertained in the manner provided, the plaintiffs are entitled to recover.

No point was made at the trial or on the argument of the appeal, that Barney and Wright were not unable to agree. There can be none that they did not select White to act in the matter.

Wright testifies that he and Barney "agreed to call in Robert White," and they two went to see him. "I told him we could not agree, then read the agreement signed by the parties, and asked if he would serve; he objected at first; we both persuaded him to go; we went and examined the premises; he told us he would let us know his valuation next morning—what his opinion was." The next morning the three met again and compared opinions and separated.

"A few days after this, Barney, White and myself met again at the sheds; White said he could not vary from his first valu-

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ation; that they were worth the full amount; we examined the sheds."

Barney's testimony is, that he, Wright and White met twice on the matter of agreeing upon a valuation of the sheds, and that White said, on the occasion of the second meeting, that "he could not alter his appraisal."

White's testimony is to the same effect.

The fact is established, therefore, by the concurring testimony of the three, that they all met together to examine the sheds, and did examine them, and separated. The next morning they met again, mentioned their respective valuations, and then separated. After this the three had another meeting on the subject, and White told them he should adhere to his valuation, viz., \$2,550.

Wright, who originally valued them at \$2,275, testifies that he subsequently changed his opinion, and regarded them worth \$2,550 when he signed the certificate with White. The certificate of valuation signed by the two is in a proper form, and imports that the valuation was made in the manner prescribed by the contract of sale.

The jury found a verdict for one-half of the amount of the valuation; the defendants having, pending the suit, settled with Lyon as to one-half of the claim.

Unless some of the defendants' exceptions are well taken, the verdict should not be disturbed.

The defendants excepted to the refusal of the Court to submit to the jury the proposition embraced in their request to the Court to charge, that "if, when the appraisers were last together they separated agreeing to meet again; Wright and White had no power, in the absence of Barney, or without notifying him of a time of meeting, to make an appraisal."

It is enough to say of this exception, that there was no evidence entitling the defendants to have that question submitted.

Barney testifies that at the last meeting had by the three, he proposed to Wright that the sheds should be appraised at one-third of their cost, and they went into an office in the yard of the premises to reduce to writing an agreement which he understood had been come to, on the basis of that proposition. But they found that they had misunderstood each other as to that matter, or at all events differed about it. He says, "We then separated

understanding that Wright was to see the plaintiffs, and we meet again." It is obvious that if Wright was to see the plaintiffs, he was to see them about the proposition which Barney had made, and the future meeting, if any, was to be between him and Wright to learn the plaintiffs' views.

White testifies that nothing was said to him on that occasion "about meeting again." He, of course, did not agree to meet with the others again, nor have any intimation that another meeting was desired by either of them. *Barney*, at the most, testifies that he "understood" they were to meet again, but he does not testify that anything was said about another meeting.

Wright says, "I might have said to Barney I would see my parties about this;" that is, about the proposition to pay one-third of the original cost of the sheds. The testimony of *Robins* and *White* tends to show that Wright was to see the plaintiffs relative to this proposition.

I do not think this testimony would justify a jury in finding that, "when the appraisers were last together, they separated agreeing to meet again." If this view be correct, then there should not be a new trial, because of the refusal to submit this question to the jury.

The exception taken to the concluding part of the charge, is attempted to be supported on the ground that if *White* was selected under an agreement between Wright and Barney, that he should determine the value and they would be bound by it, the selection for such a purpose was a void act, and he was not authorized to act at all.

The proposition charged was, that although he may have been so selected, yet if this agreement or understanding was abandoned, and if they did in fact meet and examine the property together, with a view to determine, and for the purpose of determining its value, and if the certificate was signed in good faith, as expressing the honest judgment of the two thus formed, the appraisal is valid.

It seems to us, that from the time the three met and together examined the property with a view, by their joint action, to reach a valuation which, in their opinion, was just, *White* was in fact selected "to assist them in the appraisement."

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If it be assumed that the jury may have found the question of fact covered by the first branch of the charge in favor of the defendants, then it must be taken as true that they also found that the three, nevertheless, "afterwards met and examined the property with a view to and for the purpose of determining its value, and that the valuation of \$2,550 was finally assented to and agreed upon by Wright, because such, in his judgment, was a fair and just value of the property, and also that such was the opinion and judgment of White."

They have found such to be the facts, having before their minds the further instruction that "the parties have a right to an appraisal made upon the honest effort of the three to fix a just valuation, based upon such information as they deemed useful in coming to a correct conclusion, and upon an interchange between them of the views which they severally thought should influence them in determining such value."

Such joint action of the three, with such motives and for such purposes, is, so far as White is concerned, the action of a third party selected by Barney and Wright "to assist them in the appraisement," and presents a case in which those two have acted, in spirit and substance, as the contract for determining the price prescribed.

The judgment and order appealed from should be affirmed.
Judgment affirmed.

ISRAEL T. POTTER, Plaintiff and Appellant, v. ZIBA H. KITCHEN,
Defendant and Respondent.

1. In an action for a breach of the covenant of seisin in a conveyance of land, where the breach was assigned in the complaint by negating the words of the covenant, and the answer averred the contrary, (viz., that the defendant was, at, &c., the true and lawful owner, &c.,) in the exact words of the covenant: *Held*, that the defendant held the affirmative of the issue and the burden of proof, and must prove his title. Accordingly, where, upon the trial of such an issue, neither party offers any evidence, the plaintiff is entitled to judgment.

(Before HOFFMAN, SLOSSON and WOODRUFF, J. J.)

Heard November 9; decided, December 31, 1859.

APPEAL from a judgment rendered for the defendant on the decision of a Referee.

The action is for the recovery of damages for the alleged breach of the covenants in a deed from the defendant to the plaintiff, purporting to convey certain land in the State of Illinois, (the N. W. qr. sec. No. 13, town. 8, south. range 8, west of the fourth principal meridian in the Military Bounty Tract,) "being the same tract of land as conveyed by Abel Thompson to Moses Ward by deed," dated, &c., "and by Moses Ward conveyed to the said Ziba H. Kitchen," (the defendant,) by deed dated, &c.

The covenants were as follows:

"And the said Ziba H. Kitchen doth, for himself, his heirs, executors and administrators, covenant and grant to and with the party of the second part, his heirs and assigns, that he, the said Ziba H. Kitchen, now is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not incumbered by any mortgage, judgment or limitation, or by any incumbrance whatsoever by which the title of the said party of the second part, hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever. And also that the said party of the first part now hath good right, full power, and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid."

The complaint set forth the deed and covenants, and alleged the breach of the covenant in the following terms, viz.:

"That the defendant has not kept his covenants aforesaid in said indenture contained, but has broken them in this, that the defendant, neither at the time of sealing and delivering said indenture, was or has been the true, lawful or right owner of all or of any part of the said described lands and premises, or of the appurtenances thereunto belonging, and that the said defendant, at the time aforesaid, had not good right, full power or lawful authority to grant, bargain, sell or convey the said land and premises in manner aforesaid, or in any manner, but, on the contrary thereof, the title to said land and premises, at the said time of the

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sealing and delivery of said indenture, was in some person or persons other than the said defendant, and who had not conveyed the same to the said Abel Thompson, from whom the defendant, in and by his said indenture, professed to have derived title to said land and premises.

"Wherefore," &c.

The defendant, by his answer to the complaint,

"Denies that he has broken or failed to keep any covenant therein contained, and he states that he was, at the time of the making and delivery of said deed, the true and lawful owner of said premises therein described, and of every part thereof, and had good right, full power, and lawful authority, to grant and convey the same, and he denies that the title to said premises or any part thereof was, at the time of his making said deed, in any other person or persons, as untruly stated in said complaint."

The cause was referred to Charles A. Peabody, Esq., and was tried on the 23d of May, 1859. The plaintiff produced and read the deed mentioned in the complaint, containing the covenants above stated.

The defendant offered no evidence; and the Referee thereupon rendered and reported his finding and decision,

"That the plaintiff has not proved the allegations in his complaint, to the effect that the defendant, at the time of sealing and delivery of the deed therein mentioned, was not the owner of the land and premises in said complaint mentioned, and had not full power and authority to grant the same.

"And, as a conclusion of law, he finds and reports that the plaintiff is not entitled to the relief demanded in his complaint, and that the defendant is entitled to judgment that the complaint herein be dismissed and to recover his costs of this suit."

From the judgment for the defendant entered upon this decision the plaintiff appealed to the General Term.

E. W. Chester, for plaintiff, (appellant.)

I. In the very nature of the issue, the *onus* is on the party averring the ownership, right, or seizin. In conveying he professes to have title, and, of course, can show it. The negative is impossible of proof to the plaintiff. He has no means of ascer-

taining the title. The defendant must be supposed to know his own title, and it belongs to him to establish it.

If the *onus* were on the plaintiff, it would not suffice to prove that A B had a deed to the property: he must prove a perfect title in A B. That is, he must prove an affirmation inconsistent with the affirmative averment of the defendant.

II. It is well settled that, in declaring in an action upon such covenants, the plaintiff has nothing more to do than to negative the words of the covenant. The defendant, in answer, affirms them. If it were incumbent on the plaintiff to prove an ownership or seizin in some other person, or an eviction, then it would be necessary, as a matter of course, to aver this in his pleading. The contrary has been decided, on motion, by one of the Justices of this Court in this case, and has been settled law for hundreds of years. (Stevens N. P., 1083; *Bradshaw's Case*, 9 Co., 60 [b]; Jenk. Cent., 305, Case 79; *Abbott v. Allen*, 14 John., 248.)

The Court to be sure add, "It must be understood that we decide the question of *pleading* only, without expressing a definite opinion as to the *evidence* which may be requisite to maintain the defendant's plea of seizin, &c. There may, perhaps, be ground for a solid distinction between a case where the covenant of seizin is accompanied by a transfer of *actual possession*, and a case where the premises are, in fact, vacant."

That is, the question of pleading is the question presented for the Court's decision. The *onus probandi* is necessarily involved in this, and the decision that the affirmative of the issue must be taken by the defendant results from the *onus probandi* being, in the nature of the case, upon him. But the Court do not undertake to say how much or what kind of proof it is necessary for the defendants to produce to maintain their plea. In some of the States it had been held that a seizin in fact was sufficient to remove the *onus*. It has been since settled in this State that a seizin in law is demanded by the covenant of seizin. (4 Kent's Com., 479, marg. paging; *Rickert v. Snyder*, 9 Wend., 420; *Hamilton v. Wilson*, 4 Johns., 72; *Morris v. Phelps*, 5 Johns., 49, 54; *McCurty v. Leggett*, 3 Hill, 134; *Bingham v. Weiderwax*, 1 Comst., 509.)

The case of *Kennedy v. Newman*, (1 Sandf. S. C. R., 187,) has been referred to by the Referee as sustaining his decision. It has

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no such effect or remote tendency. The only question raised was as to what proof was necessary to establish a legal sale. There does not appear to have been any issue upon the covenant of seizin—no issue except as to the legality of the sale.

III. The Referee having erred on the law of the case, the plaintiff is entitled to have the decision set aside and judgment entered in his favor, or to have a new trial.

G. T. Jenks, for defendant, (respondent.)

I. The burden of proof was on the plaintiff. (Rawle on Cov., pp. 87, 88; Greenl. Ev., vol. 2, §§ 236, 241; *Kennedy v. Newman*, 1 Sandf., 187.)

In the case *Abbott v. Allen*, (14 Johns., 247,) (relied upon by plaintiff to show that the defendant held the affirmative of the issue,) the Court expressly say, in the last paragraph of the opinion, that they "decide the question of *pleading* only," and even on the question of pleading the case of *Tallmadge v. Wallis*, (25 Wend., 107, in the Court of Errors,) holds the opposite.

In the present action, the breach is alleged both in the affirmative and in the negative, and the defendant, not the plaintiff, holds the negative of the issue to be tried.

The complaint sets forth the covenant and assigns the breach by negating the words of the covenant, and then continues: "*but on the contrary thereof* the title to said lands and premises at the said time, &c., was in some person or persons, &c., who had not conveyed the same to the said Abel Thompson, from whom," &c.

That part of the breach, then, which the defendant could traverse was the outstanding title affirmed by the plaintiff. This was traversed in the answer and put the affirmative of the issue, and the burden of proof on the plaintiff. (Findlay's Archbold's Nisi Prius, vol. 1, p. 370, marg. paging, and cases cited; 1 Greenl. Ev., § 74.)

II. The rule contended for, imposing the *onus probandi* in this case upon the defendant is, as respects the issue to be tried, admitted to be exceptional; and is urged upon the supposition that the grantor best knows of the title and can the most easily prove it.

However the fact may have been previously to the recording acts in England and in this State, it is certain that under the present laws affecting conveyances, the presumption now is, that

the grantee's facilities for ascertaining and proving any defect in the title are at least equal to those of the grantor, and that he possesses as much knowledge concerning it.

Again, the grantee (plaintiff) must set forth the facts constituting his cause of action, and to do so he must know them. So in this case, the plaintiff Potter states, as a fact in his complaint, that the defendant was not seised, but that some other person not mentioned held the title, and this he swears to. So that it follows, that of the matter in issue, the plaintiff has as much, to say the least, knowledge as the defendant, and is able to prove the precise fact in controversy, the existence of which he has verified.

It is believed that no case in this State has yet held that the burden is on the defendant in an action on the covenant of seizin, and there would seem to be no good reason why a man who gives a deed of a piece of property with the usual covenants should, by that act alone, expose himself to be brought into Court at any moment after the delivery of the deed, and there be compelled, without notice of the particular defect complained of, to furnish a complete abstract to the satisfaction of the Court. If this were so, in most cases of the sale of valuable property by a responsible grantor, it would be worth the while of his grantee, even at the expense of the costs of suit, to obtain not only a perfect abstract of title, but a judicial decision upon the validity of his title, without the labor and expense attendant upon the examination of the title usually had at the time of purchase.

The judgment should be affirmed, with costs.

BY THE COURT—SLOSSON, J. The simple and only question presented by this appeal is, whether the plaintiff was bound, on these pleadings, to prove affirmatively want of title in the defendant, his grantor, or whether the affirmative of the issue was not with the defendant, to show title in himself at the time of the grant; in other words, on which party the burden of proof as to title rested.

The cause of action, is the breach by the defendant of his covenant of seizin, and the form adopted in this complaint of stating that cause of action, by alleging the breach in the words of the

covenant itself, is all that would have been required under the old system of pleading.

So also the answer, in affirming title in the defendant in the words of the covenant, would have been a perfect plea in bar under the former system, and to this plea a replication re-affirming the allegation of want of title in the defendant, in the language of the complaint, without setting out in whom the title in fact was vested, would have been good. (*Abbott v. Allen*, 14 J. R., 248.)

Since the Code, every complaint must contain a statement of the facts constituting the cause of action. Whether an allegation of want of title in the defendant is an averment of a fact or of a conclusion of law, I will not stop to inquire; since the objection to the sufficiency of the complaint was neither taken by demurrer nor on the trial. Had such an objection been taken it might have presented, perhaps, a question of some difficulty. (*Laurence v. Wright*, 2 Duer, 673; *Schenck v. Naylor*, id., 675.)

The parties having gone to trial on these pleadings, the question is, with whom is the affirmative of the issue? The defendant contends that even if it be conceded that on a simple negation of seizin on one side, and affirmance of it on the other, in the language of the covenant, the affirmative would be with the defendant who asserts the title; yet the plaintiff in the present instance not having contented himself with such a simple statement of his cause of action, but having affirmatively alleged that the title "was in some person other than the defendant," and who had not conveyed the same to the party through whom, by the recitals in the deed, the defendant professes to have derived his title, is bound to show affirmatively the truth of his allegation.

If, without this allegation, the plaintiff would not have been obliged, in the first instance, to have proved title in some person other than the defendant, does the allegation throw that burden on him?

I think the defendant is mistaken in his construction of this sentence. It is to be observed that it immediately follows the words in which the plaintiff negatives the language of the covenant, and is prefaced with the expression, "but on the contrary thereof," &c. We think that, in truth, it forms part of the gene-

ral averment in which title is denied to be in the defendant, and was manifestly intended by the pleader to assert such want of title, in the double form of an assertion of a proposition and a denial of the contrary of it. The complaint was perfect without it, (or must, on this appeal, be assumed to be so;) and I do not think is hurt by it. If it had asserted in whom the title was, the consequences might have been different; but as it is, it is in reality but a denial of title in the defendant, and nothing more. Besides, all the reasons which, in this peculiar action, would throw the burden of proof on the defendant are as applicable, with this allegation in the complaint, as they would have been if it had no place in that pleading. If, by reason of it, the burden of proof was on the plaintiff, he would be obliged to prove an absolute title in some other party; whereas, as all the cases hold, he is not presumed to know the exact condition of the title of his grantor. This is the reason given in the books why the burden of proof is on the defendant. He has purchased in reliance upon the covenant of title; and when that is impeached or denied, the grantor is bound to assert and maintain it. In the language of the case in 14 Johnson's Reports, "it is enough if he *suspects* the grantor's title to be defective. He is not bound to wait in suspense until by possibility he can find out in whom the title really is." If the defendant had no title when he made his conveyance, the covenant was broken the moment it was made, and for this reason, all that the plaintiff need allege is simply a breach of the covenant, by negating the words of it. A breach of the other covenants can only be shown by matters occurring after they are made; and, hence, it is necessary to allege and prove such subsequent matters. The case of a breach of the covenant of seizin and the right to convey is, in respect to the order of proof, strictly exceptional.

I think the case of *Abbott v. Allen*, above cited, conclusive on this question; and to the same effect are numerous other authorities. The case of *Marston v. Hobbs*, (2 Mass., 433,) asserts the same thing. The rule is laid down in *Bradshaw's case*, (9 Coke's R., 60,) and has been fully recognized by our own decisions; nor has any distinction been made between the case of a covenant of seizin in a lease, which was *Bradshaw's case*, and that of a covenant in a deed in fee. Of both it is true that it lies more in the

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knowledge of the grantor what estate he hath than in that of the grantee.

In *Abbott v. Allen*, the breach was assigned generally in the words of the covenant—the conveyance being in fee. The plea was that the defendant was lawfully seised, &c., in the words of the covenant, and the replication was, that the defendant was not seised, &c.; still following the words of the covenant, and repeating the allegation of the breach as laid in the complaint. The defendant demurred to the replication on the ground that it did not show in whom the title was, whereby the defendant was not seised, &c. The very point, therefore, which party was to allege, and consequently prove, the actual title, was involved, and the Court held the demurrer ill taken, and gave judgment for the plaintiff; and it seems, by a note at the foot of the case as reported, that they also gave judgment in the same manner, on the same question, in another case, not reported. (*Sebeer v. Kimball*.)

In *Glinister v. Audley*, (Sir Thos. Raymond's R., 14,) on a demurrer to a similar replication, (the conveyance being in fee,) the point relied on was, that "the plaintiff ought to have shown of what estate the defendant was seised, in regard he had departed with all his writings concerning the land, in presumption of law, and therefore the *plaintiff* well knew the title;" and it was contended that it was not like *Bradshaw's case*, "because there the covenant was with the *lessee for years*, who had not the writings;" but it was held that the breach was well assigned according to the words of the covenant, and judgment was given for the plaintiff.

The case of *Salman v. Bradshaw*, (Cro. Jac., 304,) was on breach of covenant in a lease, the covenant being that the lessee had lawful estate to let for the term, the assignment of the breach was general in the words of the covenant, and held good.

In *Abbott v. Allen*, the language of the Court is unqualified. The grantor, giving such a covenant, is not bound to deliver to his grantee the prior deeds and evidences of his title. The legal presumption is that he retains them. The grantee relies on the covenant of the grantor that he has a good title, "and until the grantor discloses his title, he (the grantee) holds the negative merely, and is not bound to *aver or prove* any fact in regard to an outstanding title. *Prima facie* the grantee is to be presumed

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ignorant of the real state of the title. The grantor is not bound unless by suit to explain his title."

The whole subject is reviewed in a learned note (10) in 2d Saunders' Reports, 181, *a.*, and the distinction between this and the other covenants in a deed pointed out, and the cases cited.

The case of *Tallmadge v. Wallis*, (25 Wend., 107,) is not in conflict with *Abbott v. Allen*. The only question in that case was whether a plea of want of seizin in the grantor was a good defense to an action on the bond for the purchase money, and it was held that it was not because such a plea did not show a total want of consideration, and therefore as a plea in bar was defective. Had it shown that the defendant had been evicted, or that the grantor, the plaintiff, had no estate in the premises, or that some other person had the entire estate, it would have gone to the whole consideration; but the plaintiff may have had no legal seizin in fee, and yet have had a title by occupancy, which passed under the deed, and thus furnished some consideration for the bond. The case arose on a demurrer to this plea.

To the same effect is *Whitney v. Lewis*. (21 Wend., 131.)

The case of *Kennedy v. Newman*, (1 Sandf. Sup. C. R., 187,) is relied upon by the defendant as showing that the affirmative of proof is with the plaintiff in this action. We are unable to perceive this. The suit was evidently on the covenant against incumbrances, and the incumbrance set up in the complaint and attempted to be proved, was a lien acquired by a purchaser at an assessment sale before the conveyance to the plaintiff, and which the plaintiff had bought off, and the Court held that the plaintiff had failed to establish all that was necessary to show a valid assessment, and a nonsuit was directed. The head note would seem to indicate that the action was on the covenant of seizin; but if it were, the question of who had the affirmative of the issue, could not have arisen, since the plaintiff set out the assessment sale and his settlement with the purchaser in his complaint, and the defendant pleaded no such assessment. Under such a state of pleadings, the burden of proof was necessarily on the plaintiff.

We think the Referee erred in his conclusions, and that there should be a new trial, costs to abide the event.

Judgment reversed, and new trial ordered accordingly.

JOHN WELDON, Plaintiff and Respondent, v. THE HARLEM RAILROAD COMPANY, Defendants and Appellants.

J. WELDON and WIFE, Plaintiffs and Respondents, v. THE HARLEM RAILROAD COMPANY, Defendants and Appellants.

1. In an action against a Railroad Company, to recover damages alleged to have been caused by the negligence of the defendants' driver in the management of his team in taking it through a public street after it had been detached from a car it had been drawing, a verdict for the plaintiff will be set aside as contrary to evidence, where the testimony is uncontradicted that the manner in which the team was managed was such as had been pursued by this and other similar Companies for years without accident, and was considered by those engaged in such business as safe and discreet, especially where it is proved that the injury was caused by an unexpected and wanton assault by a third person upon the team, by which it was frightened and rendered unmanageable, and while frightened and unmanageable ran over the plaintiff.
2. The Company is not responsible for such act of such third person, though he may have been at the time employed by it in some capacity, he not being at the time of such act actually attending to any business for which he had been employed, or acting in any matter in behalf of the Company.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, December 8th; decided, December 31st, 1859.

In each of the two cases of John Weldon, plaintiff, against the New York and Harlem Railroad Company, defendants, and John Weldon and Wife, plaintiffs, against the same Company, the defendants appeal from an order denying a motion for a new trial.

The evidence was the same in the one action as in the other. The plaintiff and his wife, on Sunday evening, December 21, 1856, while crossing Fourth avenue in New York city, between 27th and 32d streets, were run over by a span of horses belonging to the defendants, and then in charge of their driver, who was taking them from 27th street, where he had detached them from a car he had been driving, to the stables of the Company.

Reardon, the driver, was at the time riding one of the horses, and while thus taking them to the stables, one Butler, who had

previously been employed by the Company as an extra man in the stables, struck the horses, frightening and making them unmanageable, by reason whereof they ran over and injured John Weldon and his wife. One action is brought to recover damages for injuries to the husband; the other to recover damages for injuries to the wife.

Each plaintiff recovered a verdict, and in each case the defendants moved for a new trial. The motions were denied, and from the orders denying them the defendants appealed to the General Term. The two appeals were argued together. The evidence, as it was viewed by the Court, is succinctly stated in its opinion.

C. W. Sandford, for appellant.

G. Dean, for respondents.

BY THE COURT—BOSWORTH, Ch. J. In these actions the evidence is the same in the one as in the other. In each the plaintiff obtained a verdict. In each the defendants moved for a new trial, on the ground that the verdict is against evidence, and that motion was denied. From the order denying it the defendants appealed to the General Term. The only question is, whether the verdict is so clearly against evidence that it is the duty of the Court to set it aside for that cause. The plaintiffs were run over, in the evening of the 21st of December, 1856, while crossing Fourth avenue, by a span of horses owned by the defendants, and at the time in charge of their driver.

The horses had been attached, in the afternoon of that day, to one of the short cars of the plaintiffs, running between 27th street and the Astor House, and had been detached from the car at 27th street, shortly prior to the accident, and the driver was, at the time of the accident, riding the off horse. The two horses were harnessed together, having between them the pole which is attached to the car when it is in use, and the whiffletrees were attached to the pole, and one end of the pole in the rear of the horses' feet was on the ground. There was no negligence or mismanagement on the part of the driver, unless it was negligence or mismanagement to go through the streets of the city with a span of horses as these were taken.

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The driver was in the act of taking the horses from 27th street to the stable, which was in a street a short distance further up town.

The accident was caused by a man by the name of Butler, who suddenly ran into the street and struck the off horse and continued to strike him until he was so frightened that the span moved so rapidly as to get out of Butler's reach. Being thus frightened, they became unmanageable and ran over the plaintiffs.

Upon the question whether it was negligence or mismanagement to drive a harnessed team through a street of the city in the manner and condition that this was, the evidence is uniform and uncontradicted that this method had been practised for years by this Company, and by the Hudson River Railroad Company, and that no accident had resulted from it. All the witnesses who had any practical experience in driving teams thus harnessed, concurred in opinion that this method was appropriate and safe, and less likely to result in accidents than an attempt to drive the team walking behind or by the side, instead of riding one of the horses.

On the evidence before us, we deem the conclusion just that the injury to the plaintiffs was caused by the misconduct of Butler; that the mode practised to drive and manage the horses was not an act of negligence, and that the evidence resulting from the practice of it for years, shows that it was a safe course, and one not fraught with any danger of accident from any causes which it was the defendants' duty to anticipate and provide against.

There is some evidence that Butler had been employed by the defendants, prior to this time, in some subordinate capacity in or about their stables. Whether he was or was not employed by them at the time of the casualty, the evidence is not definite.

There is no ground for pretending that at the time he struck one of these horses he was engaged in any actual service in behalf of the defendants, or in any business which concerned them.

His misconduct was an act of wanton or thoughtless mischief, for the consequences of which the defendants (as the evidence now stands) are not responsible.

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We cannot avoid the conclusion that the jury attached an undue importance to the fact that Butler had been and perhaps was, at the time, an employee of the defendants, although not at the time acting in the scope of his employment, or in fact attending to any business which concerned them.

Reluctant as we are to disturb the verdict of a jury upon a mere question of fact, yet we regard these verdicts as so entirely without evidence to support them, that it is our duty to grant a new trial.

The verdicts must be set aside, and a new trial granted, on payment of the costs of the trial, including the costs of perfecting the judgments. The costs of the appeals must be costs in the cause, and abide the event.

Ordered accordingly.

ANASTASIA L. HEARNE, (Administratrix of Patrick L. Hearne, deceased,) Plaintiff and Appellant, v. LAURA KEENE, Defendant and Respondent.

1. A merely voluntary payment by a party, though for the benefit of another, creates no right of action against the latter unless the latter acquiesces in or adopts the act.
2. But if such a payment is made by request of the agent for the defendant, the latter is liable for the money, provided such agent had either a general or special authority to borrow.
3. Where the authority of an agent was general in respect to a particular business, (the management of a theatre), carried on by the defendant, and it appeared that, according to the habit and course of business, his agency embraced the receipt and disbursement of the moneys of the theatre, and the raising of money to carry it on when required: *Held*, that the defendant is liable for money paid by the request of such agent for the rent of the theatre in which her business was carried on, and for which she was liable as lessee.

(Before HOFFMAN, SLOSSON and WOODRUFF, J. J.)

Heard, November 9th; decided, December 31st, 1859.

APPEAL from judgment for the defendant on the decision of Murray Hoffman, Jr., Esq., Referee.

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The action was brought to recover the sum of \$400 and interest paid by the plaintiff, Patrick L. Hearne, to the owner of the Metropolitan Theatre for the rent thereof for one week, while it was in the use and occupation of the defendant, under a hiring at that rent, payable weekly.

The money is alleged to have been paid by the plaintiff at the defendant's request. The proof showed, without contradiction, that it was paid by the plaintiff and for the defendant's benefit, but the defendant claimed that it was either a voluntary payment for which no recovery could be had, or it was an advance to one John S. Lutz on the credit of the latter, and that Lutz had no authority to borrow money for the defendant. The report and decision of the Referee was, so far as it is material to state, as follows:

"That on the 24th of December, 1855, the plaintiff paid to the owner of the Metropolitan Theatre the sum of four hundred dollars, being rent then due by the defendant, who was lessee of the theatre.

"That this payment was made at the request of John S. Lutz, who was at the time the agent of the defendant, for sundry purposes, and the agent of the theatre, receiving and paying out moneys.

"That this advance was not made by the plaintiff exclusively or chiefly on the credit of the defendant.

"That there is not sufficient evidence to clearly establish the fact that said agent was authorized to borrow in the defendant's name or engage her credit, either generally or on this particular occasion; and that there is no such clear and distinct evidence of her assent to and acquiescence in this transaction, with knowledge of the circumstances, as that such authority may be inferred or a ratification implied.

"That there is no clear and distinct evidence that the defendant knew of the application to the plaintiff, or to any one, to make this payment for her or on her credit, or that the same had been made by the plaintiff before the commencement of this suit.

"That the existence of an authority in the agent to borrow money in the defendant's name and engage her credit, is not to be inferred from the nature of the agent's duties and the fact that the money was paid to the use of the principal.

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"That, in view of the circumstances under which the money was advanced, the plaintiff is to be held to strict proof of the agent's authority.

"That the facts established by the evidence are not sufficient to render the defendant liable.

"That the defendant is entitled to judgment."

The evidence upon which the plaintiff relied, and which he claimed to entitle him to judgment, is chiefly recited in the opinion of the Court.

Judgment having been entered for the defendant upon the decision of the Referee, the plaintiff appealed to the General Term.

Pending the appeal the plaintiff died, and an order was made continuing the action in the name of his administratrix, Anastasia L. Hearne.

M. Campbell, for plaintiff, (appellant.)

I. The Referee erred in not finding that the defendant was bound by the act of Lutz as her agent.

It clearly appears from the testimony of John S. Lutz that Lutz was the agent of the defendant for all business purposes relating to the theatre. E. L. Hearne swears that a part of Lutz's business was to raise whatever money was required for the theatre. Lutz nowhere denies this.

It is also undisputed that the identical \$400, for which this suit is brought, was paid by the plaintiff to the agent of John La Farge for the rent of the defendant's theatre, at the request of the defendant's agent, Lutz.

This \$400 E. L. Hearne paid for the plaintiff to defendant's lessor. Lutz says that he does not remember telling plaintiff that this money was for the theatre. Plaintiff swears he did tell him so; and E. L. Hearne swears he gave Lutz the receipt after he had paid it, which Lutz does not deny.

The rule is well settled, that an agent, for a particular purpose, has authority to do all necessary or proper acts for the accomplishment of the end. (Story on Agency, § 60.)

Besides, the evidence of Lutz shows that he was the defendant's general agent for all business purposes. (*Anderson v. Conley*, 21 Wend., 279.)

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II. The Referee found, as a question of fact, that the plaintiff made this loan at the request of Lutz, defendant's agent, and on the credit of the defendant; but that there was not sufficient evidence that said agent was authorized to borrow in defendant's name, &c.

Lutz swears, "*I am her agent to this time for all business purposes.*" E. L. Hearne swears that Lutz was defendant's agent for "*raising whatever money was required.*" Neither Lutz nor the defendant deny this. The evidence is direct, explicit and uncontradicted. Lutz was the defendant's general agent. (2 Kent, 9 ed., p. 835.)

Therefore we say the Referee erred in finding, as a matter of fact, that there was not sufficient evidence of the authority of Lutz to borrow for the defendant, and as a matter of law that the defendant was not liable.

Lutz was the defendant's agent for paying the rent, and for all business purposes. Plaintiff paid it at Lutz's request for the defendant, which Lutz had notice of. This was notice to the defendant. (Story on Agency, § 140.)

III. The Referee erred in finding, as a conclusion of law, "that the existence of an authority in the agent to borrow money in the defendant's name, is not to be inferred from the nature of the agent's duties, and the fact that the money was paid to the use of the principal."

The only way to ascertain an agent's authority is from the nature of his duties and employment, in the absence of specific evidence. (Paley on Agency, by Lloyd, pp. 189, 207; Story on Agency, §§ 55, 56, 58, 83; 2 Kent, 9 ed., p. 832.)

In this case there is direct and positive evidence, wholly uncontradicted or impeached, that Lutz was the defendant's agent for raising money for the theatre.

IV. It appears that the money sued for was used to pay the second week's rent of the defendant's theatre in 1855; the defendant must have known this; she does not offer herself to swear she did not; she never repudiated the loan; and, after the lapse of four years, the Court is bound to presume, in the absence of proof to the contrary, that she ratified the act of her agent Lutz for her benefit.

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"Where the unauthorized act is apparently for the benefit of the principal, a very slight matter will serve to make out a ratification." (*Commercial Bank of Buffalo v. Warren*, 15 N. Y. R., 579; *Tradesmen's Bank v. Astor*, 11 Wend., 87.)

"Silence always affords a strong presumption of ratification." (Story on Contracts, § 161, and cases cited.)

V. The report of the Referee, and the judgment thereon, was clearly against evidence, and the conclusions of law from the evidence were erroneous and should be set aside, and a new trial ordered.

William D. Booth, for defendant, (respondent.)

I. The evidence showed that the loan was not made to the defendant, but to Lutz, on his sole responsibility and credit.

II. The evidence failed to show that Lutz had authority to borrow money for the defendant. His being her agent for matters connected with the theatre did not import this authority. It was not "within the ordinary scope of the business." (1 Parsons on Contracts, 41, n. f.)

To the powers of a general agent there is this restriction, *he cannot borrow money for his principal.* (*Hawtayne v. Bourne*, 7 M. & W., 595; Dunlap's Paley on Ag., § 192, and notes.)

III. The money having been borrowed without the authority of the defendant, she is not liable for it. The fact that it was paid in discharge of her debt, does not affect the question. (*Davidson v. Stanley*, 2 Mann. & Grang., 721; *Jacques v. Todd*, 3 Wend., 94.)

She has neither authorized nor ratified the act. (7 M. & W. 595, *supra*; 5 J. R., 176; 11 Wend., 87; 6 Hill, 318; *Pentz v. Stanton*, 10 Wend., 271.)

Nor is any authority to borrow implied in the nature of Lutz's agency.

IV. The report of the Referee is as conclusive on the questions of fact as a verdict of a jury. (*Foster v. Colman*, 1 E. D. Smith R., 85; *Schwart v. Taylor*, 7 How. Pr. R., 251; *Durkee v. Mott*, 8 Barb., 423; *Woodin v. Foster*, 16 id., 146; *Watkins v. Stevens*, 4 id., 168; *Green v. Brown*, 3 id., 119; *Van Steenburgh v. Hoffman*, 15 id., 28; *Spencer v. Utica & Schen. R. R. Co.*, 5 id., 337; *Leach v. Kelsey*, 7 id., 466.)

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SLOSSON, J. A right to recover, by action, money paid to the use of another can only arise where the plaintiff has paid it under some legal obligation or necessity to do so, or has done it at the request of the defendant. A mere voluntary payment by a party, though for the benefit of another, creates no right of action against him, unless the latter acquiesces in or adopts the act.

The plaintiff in the present case was under no legal obligation or necessity to make the payment in question. He made it, not at the personal request of the defendant, but of her agent; yet, if the agent had authority to make such a request, in other words, to borrow the money on her credit, she is answerable in this action.

The Referee has not found whether, when Lutz, the agent, applied to the plaintiff for the money, he told the plaintiff it was for Miss Keene, the defendant. The plaintiff swears he did so, and Lutz swears he did not, but he subsequently qualifies his assertion by saying that he did not remember saying what he borrowed the money for, though he was prepared to swear that he did not borrow it expressly for that purpose, (i. e., the use of the theatre.) I shall assume that the plaintiff's recollection on this point was the most reliable, especially as he adds that Lutz promised to pay him out of the receipts of the theatre of the following week, and that he loaned the money in consequence of that assurance, knowing him to be the agent of the defendant in matters connected with the theatre, and Lutz does not contradict this latter statement. This disposes also of the question whether the money was loaned on the individual security of Lutz only. On this evidence, it clearly was not.

What, then, was the nature and extent of this man's authority? Was it sufficient to cover this transaction?

That there was any express authority or power conferred on Lutz by the defendant to borrow money on her credit, is not pretended. If any existed, it was as incidental to his general authority.

The witness, Ed. L. Hearne, (the plaintiff's brother,) through whom this loan was effected, was the defendant's counsel in effecting the lease of the theatre, and employed as her counsel by Lutz. He swears that he knew him to be her agent in all matters relating to her payments and receipts connected with the

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theatre; that his business was to receive moneys at the office and disburse them and raise whatever money was required; that he knows it was his business to raise money when required, and that he knew this as counsel to the theatre and from conversations with him. Lutz himself does not contradict the statement of Ed. L. Hearne. He swears that he had been the agent of Miss Keene from the time she took the theatre; that he was her agent for business purposes all the time she was lessee of the theatre; that he attended to all the money business of the theatre, paid out money and received it; and that he was her agent up to the time of the trial for all business purposes. It appears that the rent was payable weekly in advance. Punctual payment was a condition of the continuance of the lease, and the defendant was personally bound to pay it; and it is not unreasonable to hold that if Lutz was the defendant's agent for "all the money business of the theatre," "for all business purposes" whatever, he had the right, in virtue of such agency, to raise money, on the credit of his principal, to meet such payments, if short of funds.

Incidental powers may be deduced from the character of the agency, (Story on Ag., § 100;) and where that is as broad as this is, and necessarily involving the duty of seeing the rent promptly paid each week in advance, I see nothing unreasonable in holding that he has power, as incidental to his general authority, to anticipate, if necessary, a week's receipts and borrow money to meet the rent on the credit of the theatre.

It is a material consideration that the defendant got the full benefit of the loan—it having been applied in payment of the rent, for which she was legally liable.

This bears on the question of authority.

In *Bolton v. Hillersden*, (1 Lord Raymond, 224,) Lord HOLT held that if a master has never intrusted a servant to charge him by signing of notes in the master's name, yet if the money for which the note is signed comes to the use of the master, such note will bind the master.

In *Davidson v. Stanley*, (2 Mann. & Grang., 721,) while the Court held that a general agent had no power as such to draw and indorse bills in the name of his principal, they approved the charge of the Judge who tried the cause, (ROLFE, B.,) and who, among other propositions, told the jury that such authority

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might be circumstantial only, as where the principal profited by the transaction. In that case the money does not appear to have gone to the use of the principal. "The fact of articles purchased having come to the use of the master," says Paley, (Paley on Agency, under head of "implied authority,") "is *prima facie* sufficient to make him liable, and he can only discharge himself by showing either that the credit was really given to the servant, or that he always gave the servant ready money to pay for the articles bought, and had not, therefore, authorized him to buy on credit."

There is another consideration which is of great weight with me. The defendant is eventually liable for this money. If Lutz has to pay it, then she is liable over to him, notwithstanding he borrowed it of the plaintiff. His having borrowed it, puts him in no worse position in respect to his right of reclamation on his principal, than though he had himself advanced it out of his own pocket in a case of necessity. The nature of his agency required him to attend to the payment of the rent as well as all other disbursements. The defendant then being ultimately liable, why should the plaintiff be turned over to an action against the agent, which would render another action necessary in order to reach the principal?

In *Pentz v. Stanton*, (10 Wend., 271,) it was held that though the defendant was not liable on a bill of exchange drawn by his agent on the purchase of goods for the defendant's use, by reason of his name not appearing on the bill, yet he was liable under the common counts, though there was no evidence that the name of the defendant had been disclosed at the time of the purchase. The plaintiff knew that he was selling to an agent for some one, as the bill was signed by the party in his own name as agent, and though the jury did not pass on the question of whether the goods were sold exclusively on the credit of the agent and the bill or not; yet the Court considered it would not be unreasonable "to hold that the plaintiff did not rely exclusively on the agent's credit, but had regard to the eventual liability of the principal, whoever he might be, if it should become necessary to resort to him, and they held that even if the plaintiff should fail in the action against the principal, on the ground that the credit was given exclusively to the agent; still, as the agent could, if

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obliged to pay the debt himself, recover it back from his principal as money paid to his use, there was no legal objection to a recovery against him in this action on the common counts;" and the Court refused to disturb the verdict, which was for the plaintiff.

The equity is all with the plaintiff. He advanced his money, without consideration, to preserve the defendant's lease, and to discharge a debt for which she was legally liable, and she has had the benefit of the payment, and ought in good conscience to pay it.

There must be a new trial, costs to abide event.

Ordered accordingly.

**THE NEW YORK AND HARLEM RAILROAD COMPANY, Plaintiffs
and Respondents, v. ALEXANDER KYLE, JR., and JUSTUS
EARLE, Defendants and Appellants.**

1. In an action against two defendants to set aside a deed of land from one to the other as a fraud upon the plaintiffs as creditors of the vendor; the record of a judgment by the plaintiffs against such grantor, is conclusive evidence against him that he owed the amount of it when the suit was brought in which it was recovered.
2. It is also *prima facie* evidence of the same fact against such vendee, upon proof being made of the facts stated in the complaint in such action, as the cause of action therein; and an admission in the answer of the vendee in the suit against him and his grantor of the facts constituting such cause of action is sufficient evidence thereof.
3. The record of such recovery against such vendor, although recovered in an action in which said vendee was named as defendant in the summons and complaint therein, and although the complaint therein stated the same facts to impeach the good faith and validity of said deed as the complaint in the last action, is of no effect as evidence for either party upon the question of the validity of such deed, such vendee not having been served with the summons, nor appeared in the first action.
4. A deed by one who at the time of making it is largely in debt, made with intent to defraud his creditors, is void as against them, when executed without consideration, though executed to a person ignorant of the fact that such grantor was insolvent and unable to pay his debts.

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, December 13; decided, December 31, 1859.

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THIS is an appeal by Alexander Kyle, Jr., and Justus Earle, (the defendants,) from a judgment in favor of the New York and Harlem Railroad Company, (the plaintiffs,) rendered on a trial had in June, 1857, before Mr. Justice HOFFMAN, without a jury.

The action is one by the plaintiffs, as judgment and execution creditors of Kyle, to set aside a deed from Kyle to Earle, dated July 6, 1854, as fraudulent and void as against the plaintiffs and other creditors of Kyle.

At the trial the plaintiffs put in evidence the record of a judgment recovered by them against Kyle, April 11, 1855, for \$206,624.50. It was recovered in an action in which Kyle and Earle were named as defendants, and which was commenced by the service of the summons on Kyle alone on the 19th of July, 1854.

The complaint in that action states, as a cause of action against Kyle, that he, being Secretary of the plaintiffs, fraudulently filled up and issued certificates of the stock of the plaintiffs amounting to over \$240,000, and applied the moneys received therefor to his own use; and also alleges the fact of the said conveyance to Earle, and that it is fraudulent, and prays (*inter alia*) for an injunction and receiver, and for a judgment against Kyle for the amount received by him on the stocks so transferred by him. Kyle alone was served with the summons or appeared in that action, and the judgment recovered in it, is merely one against Kyle for \$206,550 damages for the stock so fraudulently issued and applied by him to his own use, and costs of the action, in all \$206,624.50.

The issuing of an execution on that judgment and the return of it unsatisfied prior to bringing this suit, was admitted.

The defendants then moved to dismiss the complaint, on the ground that the record so given in evidence shows "that the matters in issue in this action formed a part of the cause of action in the action in which that judgment was rendered, and that these matters were *res adjudicata* by that judgment," which motion was denied and they excepted to the decision.

Further evidence was given, some of which (and some parts of the pleadings) are stated in the opinion of the Court.

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When both parties had rested, the defendants renewed their motion to dismiss the complaint on the ground before stated, and on the further grounds,

1st. That there was no proof of any fraud in the conveyance from Kyle to Earle, sought to be set aside, or that said conveyance was fraudulent as against the plaintiff.

2d. That the judgment roll produced was, as against Earle, only proof that the plaintiffs were judgment creditors of Kyle on the 11th day of April, 1855, and not proof of the facts stated in the complaint in the action in which the judgment was rendered, and consequently as against Earle there was no proof of the facts stated in that complaint, or that the plaintiffs were creditors of Kyle at the time of the conveyance.

The motion was denied and they excepted. The Judge found as facts, the execution and delivery of the deed of July 6, 1854, and set forth a copy of it, which purported to be made for the consideration of \$7,000.

"That such deed was duly acknowledged and recorded in the office of the Register of the city and county of New York on the 7th day of July, 1854.

"That at the time of the said conveyance the plaintiffs were creditors of Alexander Kyle, Jr., to the amount of their claim, as established by the aforesaid judgment.

"That the said Kyle, prior to such conveyance, had defrauded such Company, and out of such frauds the debt arose which resulted in such judgment; and that such conveyance was made by him after the discovery, by some one or more of the officers of such Company, of the existence of such frauds.

"That the defendant Earle is not proven to have had knowledge, previous to said conveyance, of any of the fraudulent acts of the defendant Kyle charged against said Kyle in the complaint and in the judgment aforesaid.

"That the said defendant Earle, for some time previous to and at the time of said conveyance, was reputed to be worth no property, and to be wholly insolvent.

"That no valuable consideration was paid by the said Earle to the said Kyle for such conveyance.

"That from all the facts aforesaid I find, as a conclusion of fact, that the conveyance from Kyle to Earle was fraudulent and

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void as against the plaintiff, and made by Kyle to Earle with intent to defraud the plaintiff his creditor.

"And the Court's conclusions of law thereupon were, that the judgment in the action upon which the judgment was recovered by the plaintiff against Kyle only, as above stated, was not a bar to this action, and that the plaintiffs were entitled to the judgment rendered in this action."

The defendants duly excepted to the several conclusions of the Court, and from the judgment entered on the decision, appealed to the General Term.

A. R. Dyett, for appellants.

I. Insisted that the record produced was a bar to the relief claimed in this action; that it is of no consequence that the facts in issue in this were not directly passed upon in that action; it is enough that they might have been. (3 Comst., 811; 16 J. R., 186; 10 id., 365; 13 id., 227; 1 J. C., 492; 8 Wend., 9; 5 id., 245; 2 Barb. S. C. R., 586; 7 id., 226.)

II. That such record was not evidence of any of the facts therein averred; was void on its face because Earle was a party, and was not served and did not appear in it; (5 Wend., 162; 12 J. R., 434;) that it was not evidence against Earle because he was not served with process in it, (1 Paige, 35;) and therefore there was no evidence that Kyle had defrauded the plaintiffs, or was their debtor when the deed was given.

III. There was no proof of fraud in the conveyance from Kyle to Earle; the deed purports to be made for value and was produced by the plaintiffs; the Court found as a fact that Earle was not cognizant of the frauds of Kyle upon the plaintiffs; the testimony that Earle was reputed to have no property is insufficient to repel the presumption of consideration furnished by the deed; the deed was in no sense voluntary. The mere fact that it was without consideration is not enough to set it aside; there was evidence of services rendered by Earle for Kyle sufficient to form a consideration; it was not necessary for the defendants to prove there was a consideration. (1 Barb. Ch. R., 220; 4 Wend., 300; 7 id., 487; 8 id., 9; 13 id., 375; 8 Cow., 406 id., 496; 6 Paige, 526.)

IV. Upon the facts found, the Court should have dismissed the complaint, and this Court will now do so.

Chas. W. Sandford, for respondents.

BY THE COURT—BOSWORTH, Ch. J. The judgment in favor of the plaintiffs, against Kyle, for \$206,624.50, and the record of such judgment, establish *prima facie*, as against both Kyle and Earle, that the former were creditors of Kyle to that amount at the time that action was commenced.

The complaint in that action alleges, as the grounds of Kyle's indebtedness, that while he was Secretary of the plaintiffs' Company, he fraudulently sold and assigned shares of its stock, and converted the proceeds to his own use. That action was commenced on the 19th of July, 1854. As a matter of legal necessity, it must be *prima facie* true that Kyle had done these acts prior to the 19th of July, 1854.

The complaint in the present action alleges that Kyle was such Secretary from the year 1847 until the beginning of July, 1854, and the answer of Earle admits "that Kyle was the plaintiffs' Secretary as stated in the complaint." The complaint in this action also alleges that during this period Kyle "fraudulently filled up, sold and negotiated a large amount of the certificates of the capital stock of the said plaintiffs, and received the proceeds thereof and applied the same to his own use, to an amount exceeding \$200,000 and upwards, for which said judgment was rendered;" that after the discovery of said fraudulent transfers, the conveyance in question was made.

The answer of Earle admits his belief "that Kyle, towards the latter portion of the period of his secretaryship, did, in connection with one Robert Schuyler, the President of the plaintiffs' Company, fraudulently fill up and negotiate certificates of the stock of the Company," but denies any information as to the amount or value of such certificates.

The answer admits enough to support the conclusion of fact that Kyle, prior to making the conveyance in question, "had defrauded such Company, and that out of such frauds the debt arose which resulted in such judgment, and that such conveyance was made by him after the discovery by some one or more of the officers of such Company of the existence of such frauds."

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The Court, at Special Term, found the fact to be so. The testimony of S. M. Blatchford and Charles Denison, as to the time of the discovery of Kyle's frauds, tends to support this finding. The judgment record, which was produced in evidence, establishes conclusively as against Kyle, and at least *prima facie* against Earle, the amount and value of the certificates thus fraudulently issued.

The conveyance by Kyle to Earle, which the judgment appealed from declares to be fraudulent, was made on the 6th of July, 1854, and the action, in which the plaintiffs recovered judgment against Kyle, was commenced on the 19th of said July, as is shown by the record of that judgment.

We think it sufficiently proved that Kyle had committed the frauds for which that judgment was recovered, prior to the 6th of July, 1854, and that the plaintiffs were then his creditors to the amount of the value of the stock which he had thus fraudulently transferred, and the proceeds of which he had applied to his own use, and that he made the deed of that date with intent to defraud the plaintiffs and prevent their reaching the property conveyed by that deed.

We think the evidence also supports the further conclusion of fact found by the Court at Special Term, "that no valuable consideration was paid by the said Earle to the said Kyle for such conveyance."

It was proved that Earle is the father-in-law of Kyle, and assisted Kyle while the latter was Secretary of the Company; that prior to his beginning to render such assistance he had failed in business, and that subsequently thereto he was out of business until he commenced assisting Kyle; that while so assisting him he lived with Kyle, and the Company paid him nothing; that when he went to live with Kyle, his family was broken up and his wife went to live with her father; that he had no visible means of support, and it was generally reported that Earle was worth nothing.

It is therefore established that the plaintiffs were creditors of Kyle prior to the 6th of July, 1854; that Kyle, after he knew that his frauds, out of which said indebtedness arose, had been discovered, made the conveyance of the 6th of July, 1854, with intent to defraud the plaintiffs, and made it to his father-in-law

without consideration, and that the latter was not a man of any property.

Such a conveyance is void as between Kyle and the plaintiffs, and as between the latter and Earle. Where a person owing \$200,000, created by his fraudulent acts, as soon as his frauds are discovered, conveys without consideration the only property that he owns, and the value of which does not equal the one-twentieth part of his indebtedness, such conveyance is void as against those who were creditors at the time it was made. (2 Kent's Com., 440—443, and notes.)

We cannot assent to the proposition that the record of the judgment recovered by the plaintiffs against Kyle, shows that the question of the validity of the deed of the 6th of July, 1854, was determined in that suit, either in fact or in intendment of law.

That question could not have been litigated in that suit, even if Earle had been served with process in it. (*Reubens v. Joel*, 3 Kern., 488.)

The terms of the judgment do not import that it was considered. On the contrary, it recites that Earle was not served with process, and did not appear in the action. In substance and effect Earle was no more a party to it than if he had not been named in it.

We conclude, therefore, that there was no error committed at the trial, and that the facts found entitled the plaintiffs to the relief granted to them by the judgment appealed from.

Judgment affirmed.

THE NEW YORK EXCHANGE COMPANY, Plaintiffs and Respondents, v. DAVID R. DE WOLF, Defendant and Appellant.

1. Where it is set up as a defense to a note that the maker had with others subscribed in advance of premiums to be earned by an Insurance Company, upon condition that the subscription should not be binding until the sum of \$300,000 was subscribed, and that the note in suit was afterwards given for his subscription by the defendant, induced by a false and fraudulent

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- representation that the whole amount had been subscribed, the burden is upon the defendant of showing that such subscription had not been made.
2. In such case, where the defendant produces several of the original subscription books, and the proof is clear that one book used in taking subscriptions is not produced, and other proof shows that, according to computations made at the time, a greater sum than \$300,000 had been subscribed, it is not error to charge the jury that there is no sufficient proof that the subscription was not made up, to the required amount.
 3. Where the resolution of the Insurance Company, under which the subscription was taken, expressly includes in the \$300,000 a previous subscription of \$40,000, made, but not paid in, and the agreement, signed by the defendant, refers to such resolution, that is notice to the defendant of its contents, and it is no defense that \$300,000 was not subscribed after the resolution was passed, and that the \$40,000 are necessary to make up the amount.
 4. Where some of the subscriptions were by other Insurance Companies, the Court cannot, without the production of their charters, pronounce such subscriptions unauthorized and void.
 5. The agreement for the subscription being in writing, whereby the subscribers promise to advance their notes, and the defendant having subsequently given his notes for the amount subscribed, he cannot prove as a defense that the persons who solicited the subscriptions verbally promised some of the subscribers that they should not be bound thereby to give their notes, or that they should have the privilege of substituting other notes, or other similar parol promise. (Slosson, J., dissented.)
- Whether, if proof of such parol promise were otherwise admissible in the face of the written subscription, the defendant could give such evidence under an answer, which alleged no such facts, but only that the requisite amount had not been subscribed, *Quære?*

(Before HOFFMAN, SLOSSON and WOODRUFF, J. J.)

Heard, November 11th; decided, December 31st, 1859.

APPEAL from a judgment rendered on a verdict for the plaintiff. The action was brought to recover the amount of a promissory note for \$500, dated November 8, 1855, made by the defendant, payable to the order of the Atlas Mutual Insurance Company, and indorsed to the plaintiffs.

The answer set up as a defense, in substance, that the officers of the Atlas Insurance Company proposed to raise \$300,000 by obtaining notes to that amount for premiums in advance from persons who would receive their Policies, they agreeing to insure such persons until the premiums should amount to the sum of the notes given; that such officers applied to the defendant to subscribe, and represented the Company to be in good condition

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and prosperous; that the defendant subscribed \$1,000 towards the amount to be raised, but it was agreed that the subscription should not be binding until the whole \$300,000 should be raised; that in fact the Company was then insolvent, and this was known to the said officers, and the aforesaid representations were false and fraudulent; that having been informed that the Company was in an unsound condition, and believing it to be insolvent, the defendant refused to give his said notes on that ground, and also on the ground that the whole \$300,000 had not been raised, until afterwards the President assured the defendant that the Company was solvent, and would go on with its business, and promised that the notes of the defendant should not be used for any purpose unless and until the whole \$300,000 should be made up, and the notes to that amount paid in, and until the Company should be secure and able to go on successfully with its business; that upon that condition, and the further condition that the notes should not be used for nor applied to the payment of old debts of the Company, and should be returned to defendant if the whole \$300,000 was not made up, and the notes therefor paid in, or if the said Company should not go on with its business, the defendant gave his two notes, one of which is the note in suit, but such notes, though dated in November, were not given until February, 1856; that the Company was in fact then insolvent, and this was known to the officers and to the President, and the obtaining of the notes was a fraud, and the notes were obtained with the intent to use them in violation of the conditions on which they were obtained, and in violation of such conditions the note in suit was soon transferred, and the same was transferred to the plaintiffs on account of a prior indebtedness in fraud of the defendant's rights; that the \$300,000 had never been made up, nor notes therefor given, and the Company was not placed on a secure basis, and was unsound, insolvent and unable to go on with its business, and in March, 1856, suspended its business, and a Receiver thereof was appointed; and that no Policies were ever issued to the defendant on or in pursuance of the agreement to insure, and the notes are without consideration and void.

The action was tried on the 14th day of January, 1859, before Mr. Justice WOODRUFF and a jury.

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It appeared on the trial that the plaintiffs received the note in suit from the Atlas Insurance Company on the 1st of March, 1856, to be credited to the account of that Company against the bills of the plaintiffs for the rent of their office for the quarter ending February 1st, 1856.

Testimony was given on both sides bearing on the question whether the note in suit was obtained by fraud or false representations. But the contest on the trial related mainly to the inquiry whether the whole subscription of \$300,000 in aid of the Company was in fact made up.

It appeared that on the 12th of October, 1855, several parties had subscribed an agreement binding themselves to give notes to the Company for the amounts respectively specified at four months in advance of premiums, and this subscription amounted to \$40,000.

On the 8th of November following, at a meeting of the Trustees, it was resolved, "that a subscription in the sum of \$400,000 in business notes to be written against, be obtained; subscriptions to be binding when \$300,000 is subscribed, including the \$40,000 already subscribed."

Under the same date, the Trustees themselves agreed to subscribe the sum of \$50,000, on the same conditions set forth in the resolution, to be paid in cash or notes at thirty, sixty, ninety days, or four months, provided the amount of \$300,000 is subscribed under that resolution.

Subscription books were thereupon prepared, containing copies of the \$50,000 subscription, of the \$40,000 subscription, and a subscription agreement to be signed by others who should consent to become subscribers. The books contained as follows:

"NEW YORK, November 8, 1855.

"The Trustees of the Atlas Mutual Insurance Company, in order to show their desire and determination to place the Company in an independent position, do subscribe the amount set opposite their names, on the same conditions set forth in the resolution of the Board of this date, to be paid in cash or notes at thirty, sixty, ninety days, or four months; provided that the amount of three hundred thousand dollars is subscribed under that resolution.

"J. S. Sturges,	F. A. Crocker,	} \$50,000.
J. S. Whitney,	J. Boynton,	
S. Knowlton,	L. R. Cheesbrough,	
Snow & Burgess,	E. B. Litchfield,	
Edward A. Lambert,	J. Collins,	
J. E. Southworth,	T. C. Durant,	
Marcellus Massey,		

"We, the subscribers, hereby agree to give our notes for the amount opposite our names, at four months, in advance of premiums, to the Atlas Mutual Insurance Company. Notes to be given when \$40,000 is subscribed.

"NEW YORK, October 12, 1855.

"Arthur Leary, \$5,000," and twenty-nine others, whose aggregate subscriptions amounted to \$40,000.

"We, the subscribers hereto, agree to give to the Atlas Mutual Insurance Company our notes, in advance of premiums of insurance, at six and twelve months, in equal amounts, for the sums set opposite our names respectively, it being understood that, in consideration thereof, the subscribers are to be allowed by the Company, at the maturity of their notes, five per cent on the amount thereof.

"This subscription is towards the \$400,000 subscription authorized by a resolution of the Board of Trustees of this date, and is not to be binding until the sum of \$300,000 is subscribed.

"NEW YORK, November 8, 1855."

With the subscription books thus prepared, the friends of the Company proceeded to obtain subscriptions; and the defendant became a subscriber to the amount of \$1,000.

After a few weeks the subscription books were collected, and the officers footed up the subscriptions and announced that upwards of \$300,000 (including the \$40,000) had been subscribed, and the Trustees passed a resolution "that the officers commence at once to collect the notes to that amount, and proceed in liquidating the liabilities of the Company therewith."

The defendant gave his two notes, for \$500 each, for the amount of his subscription, one of which was transferred to the plaintiffs, and is the note in suit.

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On the trial, some of the original books of subscription were produced, and a book which appeared to have been copied from some of the books; but it appeared, by distinct, uncontradicted evidence, that one of the books in which subscriptions were taken was missing, and no copy was produced, nor was any evidence given showing the amount of the subscriptions in that missing book.

It also appeared that, among the subscriptions, were several which were made by other Insurance Companies, or by their officers, and that the amount of such subscriptions was \$37,000.

The defendant's counsel offered in evidence a resolution of the Trustees passed October 30, 1855, in the following words:

"That any arrangement made by the Finance Committee in paying, or arranging for funds to pay, the pressing liabilities of the Company, and to sustain the institution till other means can be provided, if they shall make themselves or their friends personally liable, the same shall be considered and treated as confidential in any event, equal in all respects to the amount of \$40,000 already subscribed by the friends of the Company for its relief."

The plaintiffs objected to the evidence, and it was rejected by the Court, and the defendant excepted.

The Court allowed evidence to be given of the state and condition of the Company, and the amount of its liabilities when the subscription was taken up, and when the defendant's notes were given, but rejected evidence to show the amount of its liabilities when it suspended in March, 1856, and the defendant excepted.

Questions were put to several of the witnesses to show that, at the time they respectively signed the written subscription, there was some parol agreement that they should not pay it, or that they should have a privilege to substitute other subscribers in their place. To these and some other similar questions the plaintiffs objected, and the objection being sustained, the defendant excepted.

In relation to the subscriptions by other Insurance Companies, their charters were not produced, and there was no evidence in relation to the authority under which the subscriptions were made, except that one, by a Philadelphia Insurance Company,

was made by an agent, with the approval of its President, and another, by a Company in this State, was subscribed by the Vice-President, without any resolution of the Board of Directors.

After the case was summed up by the respective counsel, the defendant's counsel requested the Judge to charge the jury :

1st. That the \$40,000 subscription, of date of October 12, 1855, was a separate subscription, independent of the \$400,000 subscription of the 8th November, 1855, and not entitled to be included in the sum of \$300,000, which, by the terms of said subscription of the 8th November, 1855, was to be subscribed before the same should be binding.

2d. That the subscriptions of the Insurance Companies that subscribed to the said subscription of November 8, 1855, were void, because they had not power or authority to make such subscriptions.

3d. That even if such Insurance Companies had the power so to subscribe, such of their said subscriptions as were made were void, because they were not authorized by their respective Boards of Directors.

But, except so far as the matters aforesaid are contained in the instructions given to the jury, as hereinafter stated, the Judge refused to charge the said propositions; and the defendant's counsel excepted.

The Judge charged the jury as follows :

"The 12th section of the charter of the Atlas Mutual Insurance Company reads as follows :

" 'The Company, for the better security of its dealers, may receive notes for premiums in advance of persons intending to receive its Policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business; and on such portions of said notes as may exceed the amount of premiums paid by the respective signers thereof at the successive periods, when the Company shall make up its annual statement, as hereinafter provided for, and on new notes taken in advance thereafter, a compensation to the signers thereof, at a rate to be determined by the Trustees, but not exceeding five per cent per annum, may be allowed and paid from time to time.'

"The Company, by the 12th section of the charter, was authorized to receive agreements for insurance and notes in advance,

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and allow five per cent to persons making such advance, and to use such notes in payment of losses, &c.

"This note now in suit was given under an agreement, and in advance of premiums.

"The Company had a right to use such notes, and the plaintiffs, receiving one of such notes in payment of rent, stand, *prima facie*, entitled to collect it.

"If, however, it was obtained by fraud and misrepresentation of existing facts, the defendant is not bound to pay it.

"1. Was it given under false representations that the \$300,000 subscription was made up?

"2. Was it given upon false representations that the Company was in good condition?

"*First.* The defendant has the burden of showing that the \$300,000 of subscriptions was not made up. Has he shown it?

"If there are subscription books, or a subscription book, which is not produced, nor its contents proved, then you have not the means of knowing the amount subscribed; and there is no sufficient proof that the subscription was not made up. (To this the defendant's counsel excepted.)

"*Second.* As to the actual condition of the Company. If fraudulently represented solvent and sound when it was not so, and the defendant's subscription was obtained by that means, and was given in reliance on that representation, and the note was also procured for such subscription in pursuance of such fraud, the defendant is not liable."

The jury thereupon found a verdict for the plaintiffs for the amount of the note, with interest, \$593.55.

The defendant moved for a new trial: the motion was denied; and judgment was entered for the plaintiffs. From the judgment, and also from the order denying a new trial, the defendant appealed.

E. S. Young, for appellant.

I. The Judge erred in refusing to charge the jury that the \$40,000, of the date of October 12, 1855, was a separate subscription, independent of the \$400,000 subscription of November 8, 1855, and not entitled to be included in the sum of \$300,000 which, by the terms of the subscription of 8th November, 1855,

was to be subscribed before the same should be binding. (*Berry v. Yates*, 24 Barb., 199.)

II. The Judge also erred in refusing to charge the jury that the subscriptions of the Insurance Companies that subscribed to the said subscription of 8th November, 1855, were void, because they had not power or authority to make such subscriptions. (*Berry v. Yates*, and cases there cited.)

III. The Judge also erred in refusing to charge the jury that even if such Insurance Companies had the power so to subscribe, the said subscriptions made by them were void, because they were not authorized by their respective Boards of Directors.

IV. There was error in that part of the charge to the jury which was to the effect that there was no sufficient proof that the \$300,000 subscription was not made up. The evidence upon this question should have been left to the jury.

V. There was also error in disallowing the question as to the amount of the liabilities of the Atlas Mutual Insurance Company at the time it suspended in March, 1856.

VI. The resolution of the Board of Directors of said Insurance Company, dated October 30th, 1855, was competent evidence, and should have been received.

It was competent as showing, by action of the Board of Directors, that the \$40,000 subscription was confidential, and not on the same footing with the other subscriptions, and consequently not entitled to form a part of the \$300,000 requisite to make the subscription of 8th November binding, and also as tending to show fraud in the subscriptions.

VII. There was error in disallowing proof of a parol arrangement between the witness, on behalf of the International Insurance Company, and the Atlas Mutual Insurance Company, in reference to the subscription of the International Insurance Company, and the notes to be given therefor.

The object of the defendant's counsel in asking the question, was not to show some other valid agreement, varying the terms of the subscription, but to show an arrangement connected with said subscription, and the notes to be given, which would be a fraud upon the other subscribers, and rendering the subscription itself void. It was competent to show any fraud connected with the subscription. (Greenl. on Ev., vol. 1, § 284.)

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VIII. The question, as to whether the notes of the International Insurance Company were given in pursuance of the subscription, should have been allowed.

The answer sought by the question was material as an item of evidence tending to show that the subscription was fraudulent.

IX. The question as to whether any, and if so what, inducements were held out to witness for him to subscribe, was proper, and should have been allowed.

The procuring of the witness' subscription, in the manner offered to be shown, was fraudulent as to the other subscribers, and the Company could not have enforced the subscription against the witness.

X. There was similar error in disallowing proof of other parol agreements with subscribers.

Subscriptions made under the circumstances offered to be shown were not valid. (*Stewart v. The Trustees of Hamilton College*, 2 Denio, 403, 418.)

XI. The verdict of the jury was against the weight of evidence.

John E. Parsons, for respondent.

I. The defendant undertook to show the condition of the Company when it suspended in March, 1856. It appeared by defendant's witnesses, that the Company's losses in January and February, 1856, were very large. However this might be, evidence of the pecuniary condition of an Insurance Company in March, would not bear upon its condition in January or February, and such evidence was properly rejected. Evidence of its condition when the defendant gave the note in suit was admitted and was given, and this was all that was material.

II. The resolution of October 30th, 1855, offered by the defendant, and excluded by the Judge, had nothing to do with the subscriptions—was irrelevant and immaterial; amounted to a mere declaration on the part of certain of the Company's Trustees, and could not affect the subscriptions, which made no reference to such resolution—were absolute in terms and binding in favor of the Company, as also of the subscribers.

III. The Judge excluded evidence by which the defendant sought to show arrangements made by the Company with certain of the subscribers, tending to vary the obligation of their sub-

scriptions. The subscription was a written agreement between the Company and the subscribers, and between the subscribers themselves. Parol evidence to vary its terms was properly refused.

Besides, the answer set up no such defense.

IV. The Judge properly refused to charge that subscriptions by other Insurance Companies were void for want of authority, and because not authorized by the Boards of Directors of such Companies.

The defendant had the burden of showing that the \$300,000 of subscriptions was not made up. To do this he showed certain subscriptions, and claimed that they did not amount to \$300,000. It appeared, however, that one subscription book was lost, and there was no evidence of its contents. Without this evidence, the jury had not the means of knowing what amount had been subscribed, and it therefore, as it was impossible to find the \$300,000 not made up, was immaterial whether the Insurance Company subscriptions were authorized or not.

Again, the defendant put such Insurance Company subscriptions in evidence. To avoid them, the *onus* was on him of showing them unauthorized. He offered no evidence with such view. Nor could such want of authority be shown without the production of their charters.

V. A subscription of \$40,000 was got up under date of October 12th, 1855. This was written in all the subscription books, including the one signed by defendant, before any subscriptions were obtained. The resolution of the Company, of November 8th, 1855, referred to in the body of, and so made part of, the subscription of that date, was offered in evidence by plaintiffs to connect these two subscriptions, and it became by reference part of the agreement of subscription which the defendant signed. It was, therefore, properly included in the amount of \$300,000.

The other ground for refusing to charge that the \$40,000 should not be included, was the immateriality of such request, for the reason that by the loss of one subscription book, and failure to prove its contents, there was no proof to go to the jury that the subscription was not made up.

BY THE COURT—HOFFMAN, J. The appeal of the defendant from the judgment, brings up, *first*, the question whether the

charge of the Judge was erroneous; *second*, whether he was bound to charge anything which he was particularly requested to charge, and refused to do; *third*, as to his rulings upon matters of evidence.

1st. The portion of the charge excepted to is as follows: "If there are subscription books, or a subscription book which is not produced, nor its contents proved, then you have not the means of knowing the amount subscribed, and there is no sufficient proof that the subscription was not made up."

James Smith had sworn, that he was a Director, and had obtained subscriptions for the Company. That there was one book missing; the one in which he obtained subscriptions.

Books Nos. 2 to 9 had been produced and authenticated by Tracy, the Secretary. Each book contained some original subscriptions, and some not original, copied from the originals in other books. The books were in the hands of different parties. He transcribed into one book, all the names he knew to be genuine, and also the names and amounts of those he otherwise knew had subscribed. The amount of the subscriptions footed up \$300,000.

No. 1 is the book thus referred to. The witness did not know that what were produced were all the subscription books used. He got some information from the parties or others as to some subscriptions. \$300,000 could be made up from the books by any person without any duplicity.

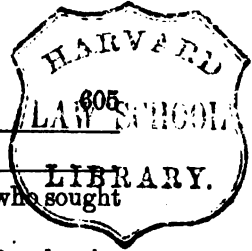
Sturges states that he footed up the subscriptions, and they amounted to considerable over \$300,000. Chesebrough's was over \$13,000. After the computation was made, the books went out again.

Tracy, in his computation of the amount, took Chesebrough's subscription at \$6,500.

It is shown that book No. 1 was not a full statement of the whole of the subscriptions, and nothing else in evidence professed to be so. The book missing may have contained subscriptions to a heavy amount, enough to cover all subscriptions objected to, even if the objections were tenable. The Judge was right in saying that the defendant had not shown what he was bound explicitly to do; that the \$300,000 subscription was not

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made up; the burden of proof was on the defendant who sought to avoid his note on that ground.

2d. The Judge refused to charge that the \$40,000 subscription of October 12th was not to be included in the sum of \$300,000.

The terms of the subscription of the 12th of October were unconditional. The resolution of the 8th of November expressly includes the \$40,000 as part of the \$400,000 to be raised, the subscriptions not to be binding until \$300,000, including such \$40,000, was subscribed. The defendant subscribed book No. 3 with the names of the subscribers to the \$40,000, and a copy of their subscription in it. There was scarcely ground for leaving the question to the jury of its inclusion. This was not asked, but a peremptory exclusion of what was rather matter of fact than of law, had the evidence been uncertain. Besides, the agreement signed by the defendant declares his subscription to be towards the subscription authorized by a resolution of the Board of Trustees of that date (Nov. 8th.) And that resolution in terms includes the \$40,000 in the \$300,000 to be subscribed before the subscriptions should be binding. By such reference the defendant had notice of the terms of the resolution, and the resolution became incorporated in the defendant's agreement. So that including the \$40,000 in the computation, to show that \$300,000 had been subscribed, was in exact conformity with the agreement of the parties, for the resolution in pursuance of which the defendant's subscription was expressed to be taken declares that it shall be so included.

The second request to charge was refused properly. We have decided that the burden of showing that a Company has not the power of subscribing must be clearly made out by production of its charter, or some general law.

As to the third request, proof was made, that subscriptions were not authorized by the Board of Directors of the International Insurance Company; and as to the Philadelphia Insurance Company, there is no proof on that point. As to the former, Ogden says there was no resolution authorizing the subscription, but the Company knew of its being made. The principal members of the Board knew it; the members of the Finance Committee knew it.

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The defendant has not proven enough in this instance. He should have shown that the power rested only in the Board.

So in the case of the Philadelphia Company, the President approved of the subscription, and we know nothing of the charter of its incorporation, its prohibitions, or delegation of powers.

3d. As to the exceptions relating to the rulings upon evidence.

The exclusion of the resolution of the 30th of October, 1854, was proper. Whatever privileges had been given to the subscribers for the \$40,000 were extended to every subscriber towards the \$300,000. By the resolution of the 8th of November the \$40,000 was expressly declared to be part of the \$300,000. The resolution of the 30th of October comprehends all the arrangements which might be made by the Finance Committee for paying the pressing liabilities, and would be equally available to all the subscribers. So that if there was anything confidential in the advance of the \$40,000, it was extended to all the subscribers. Besides, the defendant had notice that the \$40,000 subscription was included with his own to make up the \$300,000, and was so constructively notified of its terms and conditions; and if it was affected by the resolution of the 30th of October, he had such notice thereof before he subscribed. So that in neither aspect could that resolution affect his liability on his note.

The most important of the exceptions refer to the refusal of the Judge to permit evidence to be given of a parol agreement with various subscribers, made at the time, by which their respective subscriptions should not be absolute as they purported to be, but upon stipulations which would discharge them, or materially modify them, so that the \$300,000 was not in truth fairly subscribed.

It seems to me impossible that evidence to an arrangement of this nature can be allowed. The subscriptions, or the notes given in pursuance thereof, were clear, definite and unconditional. I cannot believe that one of the subscribers could have set up with success a defense based upon such a contract, when sued by the Company. (*Hoare v. Graham*, 3 Camp., 57; *Hogg v. Smith*, 1 Taunt., 347; *Eaves v. Henderson*, 17 Wend., 190; 5 Pick., 506.)

In the case of *Stewart v. The Hamilton College*, (2 Denio, 408,) the resolution which qualified the apparent subscription was in writing.

In *Acker v. Phoenix*, (4 Paige, 305,) a composition deed was signed by the defendants among other creditors of the plaintiffs. They agreed to take certain securities to the amount of twelve shillings in the pound in full; on condition, however, that all the creditors united in the deeds. The plaintiffs sought to enforce the agreement for compounding, and alleged that it was understood and agreed at the time that certain creditors, known as confidential, were not to sign but were to be paid first. On demurrer the bill was held bad; the complainants were attempting to vary the effect of the written agreement in a very essential point, by an allegation that there was a parol understanding at the time of the execution of the deed that a certain class of creditors were not to join. This was wholly inadmissible.

In the late case of *Humfrey v. Dale*, in the Queen's Bench, (38 L. & Eq. R., 120,) Lord CAMPBELL in delivering the opinion of the Court, which was particularly connected with the admissibility of the proof of usage, stated a rule which appears to me of very general application to all questions of this nature. "Can the two parts of the alleged contract" (that which is written, and that proposed to be proved) "have full effect given to them, if both were written down without making it insensible or inconsistent."

This rule will show the true principle of the important case of *Chester v. The Bank of Kingston*. (16 N. Y. R., 336.) Parol evidence was admitted to prove that a bond for the payment of money absolute in its terms, was delivered under an agreement by which it was to be held by the obligee as collateral to the debt of third parties, and to be canceled upon payment being had from them.

If the case of proof converting an absolute deed into a mortgage is not strictly within the distinction and rule thus stated, it may be treated, as it has always been, as exceptional. (*Despard v. Walbridge*, 15 N. Y. R., 374.)

Again, the answer avers that \$300,000 had not been subscribed. It may be a question whether under this averment it was competent for the defendant to prove that although the

amount had been subscribed, there had been made concurrent parol agreements with some subscribers to the effect sought to be proved.

There are a few other exceptions to be noticed.

The question whether the notes of the International Company were actually given is clearly immaterial. The subscription of the defendant was not on condition that the other subscribers should pay their subscriptions.

So was the question as to the indebtedness of the Atlas Company to the Philadelphia Company.

The exception as to Chesebrough's subscription is not intelligible to me, and no notice of it is taken on the points.

The amount of the liabilities of the Company in March, 1856, cannot properly bear upon any of the issues.

The judgment must be affirmed, with costs.

SLOSSON, J. The charge of the Judge, in respect to the effect upon the defendant's liability, of false statements, if there were such, as to the pecuniary condition of the Company, made at the time of procuring his subscription and notes, was as favorable as it could well have been for him; and unless the verdict on that question is clearly against the weight of evidence, there is no reason for disturbing it. Such, in my opinion, is not the case; and, in so far as this appeal involves that consideration, it is unnecessary to add anything more.

The only serious questions in the case arise under the refusal of the Judge to charge the requests submitted to him; his charge as to the effect of the absence of the missing subscription book, and of the proof of its contents; and his rulings on the trial, especially that which excluded evidence offered to show that a fraud had been practised upon the subscribers by secret arrangements between some of them and the Company, by which they were to be favored in respect to their subscriptions, in some way or manner not common to all the subscribers.

First. The Judge refused to charge, as requested, that the \$40,000 subscription of October 12, 1855, was a separate subscription, independent of the \$400,000 subscription of the 8th November, 1855, and not entitled to be included in the sum of \$300,000 which, by the terms of the subscription of 8th Novem-

ber, was to be subscribed before the same should be binding. I think the reference to the resolution of the Board of 8th November, contained in the agreement prefixed to the defendant's subscription in the subscription book, adopted that resolution as part of his contract. This agreement is the language of the subscribers, and the reference to the resolution is their own reference; and the contents of the resolution must be presumed to have been known to them. As, by this resolution, the \$40,000 subscription is expressly to be included in the \$300,000 subscription, and to go to make up that amount, the Judge properly refused to charge in respect to it as requested. (*Coddington v. Davis*, 1 Comst., 192.)

I am aware that a different view has been entertained on this subject by one of the learned Justices of the Supreme Court in this district, sitting at Special Term, in the case of *Berry v. Yates*, (24 Barb., 199,)—an action brought by the Receiver of the Company against one of these subscribers; but my own convictions will not allow me to acquiesce in his conclusions.

The Judge very properly refused to charge that the subscriptions by the Insurance Companies were void because they had no power or authority to make such subscriptions, and also to charge that, if not void for that reason, they were void because not authorized by their respective Boards of Directors, for the reason that the charters of such Companies were not produced, whereby the Court might judge whether they had such power or not; and no presumption can be entertained that they had not the power.

Second. The Judge charged that, if there were subscription books, or a subscription book which was not produced nor its contents proved, then the jury had not the means of knowing the amount subscribed, and there was no sufficient proof that the subscription of \$300,000 was not made up. It was proved that one of the subscription books was missing. Whether its contents were proved was left to the jury, and there was evidence that the original subscriptions made in one book were copied into the others, to show who had subscribed; and the same witness who proved this, (Tracy, the Secretary of the Company,) also proved that he drew off from the different books the amounts of the subscriptions into another book, as also the names and amounts

of all which he knew had subscribed otherwise than from the books, and that the amount of the subscriptions so collected footed up \$300,000, and he says that he knew that the names and amounts contained in the subscription books were all actual subscriptions, from his knowledge that the handwriting was genuine.

It is true he said, on his cross-examination, that he did not carry into this book all the subscriptions which he found in the subscription books; but he swears that \$300,000 could be made up by any person from the books without duplicity.

This book, so made up by the Secretary, was before the jury, and it is fair to presume that they considered it as evidence, to some extent, of the contents of the missing book.

One of the Directors of the Company swears that he was present when the computation or summing up of the amount of subscriptions was made, and that there was something more than \$13,000 over the \$300,000 subscribed. One of the Trustees swears that he footed up the subscriptions, a few days after the meeting of 30th November, (when it was understood that the subscriptions had been completed,) and that they amounted to considerably over \$300,000, excluding the special subscription of \$50,000; and another Trustee swears substantially to the same thing.

Under all this evidence, the jury were justified, I think, in assuming, not only that the whole amount had been subscribed, but that that result had been ascertained by reference to all the subscription books.

But if this were otherwise, then, as the burden of showing that the whole amount of the \$300,000 had not been subscribed was clearly on the defendant, it was true, as a legal proposition, that, if one of the subscription books was missing and its contents not proved, the defendant had failed to show affirmatively that the whole amount had not been subscribed.

Third. A more important question arises under the exclusion of evidence which was offered with a view to show that a fraud had been practised upon the subscribers by some secret arrangement between some of them and the Company, and I shall group together the offers of testimony made and questions put on that subject, so as to embrace them all in one discussion.

The defendant offered in evidence, from the minutes of the Board of Directors, a resolution adopted by the Board, dated the 30th October, 1855, as follows :

"That any arrangement made by the Finance Committee in paying or arranging for funds to pay the pressing liabilities of the Company, and to sustain the institution till other means can be provided, if they shall make themselves or their friends personally liable, the same shall be considered and treated as confidential in any event, equal in all respects to the amount of \$40,000 already subscribed by the friends of the Company for its relief."

At the meeting at which this resolution was passed were present thirteen Directors or Trustees, of whom nine appear to be subscribers to the \$40,000 subscription, and the same number were subscribers to that for \$50,000. This evidence, on objection being made, was excluded, though the ground of the objection is not stated in the Case.

On the examination of Mr. Ogden, the Vice-President of the International Insurance Company, and who had subscribed for that Company, the following question was put :

"At the time of such subscription, was there any arrangement made with you by the Atlas Mutual Insurance Company in reference to said subscription, and the notes to be given under that subscription; and if so, state what it was?"

This question was objected to, on the ground that the testimony would tend to vary by parol the terms of the subscription; and upon the Judge asking the defendant's counsel if he proposed to show a parol arrangement, he stated that he did, and thereupon the Judge excluded the testimony.

The defendant's counsel then asked the witness whether the notes of the International Insurance Company, in pursuance of said subscription, were given to the Atlas Insurance Company; and on objection being made, this question was excluded.

The counsel then put this question to the witness: "State whether any, and if so what, inducements were offered you to induce you to make such subscription?" The counsel stated that he proposed to prove that there was a parol arrangement, amounting in effect to an agreement that he need not give his notes for his subscription; upon objection being made, the evidence was excluded.

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On the examination of Mr. Whipple, Marine Agent of the Philadelphia Insurance Company, and who had subscribed for that Company, this question was put:

"Was there any particular arrangement between you and the Atlas Mutual Insurance Company in reference to that subscription; and if so, state what it was?"

This question was objected to so far as it was sought to alter the subscription by proof of a parol arrangement, and the Judge sustained the objection, and excluded the testimony.

"The question" was then put, "whether the Atlas Mutual Insurance Company was indebted to the Philadelphia Insurance Company at that time?" and this question, on objection, was overruled.

On the examination of Mr. Arrowsmith, one of the subscribers, this question was put by the defendant's counsel:

"State whether your subscription was a subscription substituted in the place of another party?" The counsel stated the object of the question to be to show that some of the sums were subscribed by the Trustees themselves, with a parol privilege reserved of procuring other subscribers subsequently in their place, and that the witness's subscription was one which was so substituted. The question, on objection being made, was disallowed.

If all or any of these questions, or the evidence offered and rejected, tended to show that any portion of the subscriptions that enter into the aggregate of the \$300,000, were made under an arrangement with the Atlas Insurance Company, securing to those subscribers an advantage not shared in by, or common to, the other subscribers, or that any such advantage was given to them by any subsequent arrangement between them and the Company before the defendant's subscription was obtained, it would be a fraud upon him and a perfect defense to this action. The principle applicable to the cases of composition deeds between debtors and creditors, or between a single debtor and creditor, where the former brings in a surety on a compromise agreement with the creditor to take a part of the debt for the whole, and in which some secret arrangement is made between the debtor and the creditor, not communicated to the surety, or between the debtor and some of the creditors signing the composition deed, not made known to the others, by which the

creditor in question is to receive some benefit for his acquiescence in the compromise not shared in by the others, is applicable to this case. In such a case even the party who is to receive the benefit cannot enforce it against the debtor, because it is a fraud on the surety or the other creditors. (*Cecil v. Plaistow*, Anst., 202; *Weed & Weed v. Bentley*, 6 Hill, 56.) The principle has been applied to a case very analogous to the present, (*Stewart v. Trustees of Hamilton College*, in error, 2 Denio, 403,) in which the Trustees sued Stewart upon a subscription made by him and others to raise a fund for the college. None of the subscriptions were to be binding unless the aggregate of all amounted, by a certain day, to \$50,000; previous to that day certain individuals entered into an agreement to make good any deficiency that might appear in the amount of the subscriptions on the last day before that in which the aggregate was to be completed, and it was contended by the Trustees that this agreement, with the subscriptions already obtained, was a fulfillment of the condition upon which the subscriptions were to become binding; but it appeared on the trial, that when that agreement was signed the Trustees passed a resolution by which they pledged themselves to continue to raise subscriptions and contributions after the day stipulated for the completion of the aggregate amount aforesaid, to save harmless those persons who might pledge themselves to make good the deficiency. The Trustees obtained judgment, but the Court of Errors reversed the judgment on the very ground that this undertaking to indemnify those who had guaranteed against a deficiency was a fraud on the other subscribers. "The essence of every agreement of this kind," said the Chancellor who gave the opinion of the Court, "is that there should be perfect equality among the subscribers as to the nature and extent of their respective liabilities, for the several sums subscribed by them respectively."

Every subscriber is entitled to insist that every other subscription shall be as *bona fide* and as binding as his own.

Did any of the evidence ruled out in this case tend to establish a fraud of this description? and first as to the resolution of 30th October.

That resolution was to the effect that if the members of the Finance Committee or their friends should make themselves

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personally liable in paying or arranging for funds to pay the pressing liabilities of the Company, and to sustain the institution till other means could be provided, such liabilities should be treated and considered as confidential, in any event equal in all respects to the amount of \$40,000 already subscribed by the friends of the Company for its relief.

I think the obvious meaning of this resolution is to place the members of that committee and their friends who might, through their influence, be instrumental in raising funds for the relief of the Company on some footing of confidential preference which the subscribers to the \$40,000 fund already enjoyed. What mode of raising funds was contemplated, is not so obvious, but I think it is fairly to be inferred from the phraseology of the resolution, that it was by means of subscriptions. It would perhaps be forcing the construction of the resolution, to say that it had reference to the subscriptions for \$400,000 which were subsequently authorized by the resolution of November 8, but that is not of vital importance. It is enough that the resolution recognizes the \$40,000 subscription as already a confidential one, and that can have no other meaning than that some arrangement had been made in favor of that class of subscribers, which was in some event or under some contingency to give them an indemnity for their subscriptions, or some peculiar preference in respect to reimbursement out of the assets of the Company. In what respect does this differ in principle from the resolution of indemnity in the case of *Stewart v. Trustees of Hamilton College*, above cited?

In any aspect in which I can view it, it was some evidence to go to the jury in respect to some beneficial arrangement between the Company and a very important class of the subscribers, having respect to their liability as subscribers, which was not shared in by the others, certainly not by the defendant.

Without this \$40,000 the \$300,000 of subscriptions could not manifestly be made up, and if the subscribers to that fund were entitled to any benefit in respect to their liability, by virtue of an arrangement with the Company, entered into before the other subscriptions were solicited, and not communicated to and assented to, or shared in by the others, it was a fraud upon them.

If it be said that by reason of the absence of the missing book it cannot certainly be said that the whole \$300,000 may not have been made up without the aid of this particular amount, the answer is, that the whole evidence is opposed to such an idea; and if it were not, this amount could not be separated from the rest; it would still remain true that some portion of the subscribers, whose aggregate constituted the \$300,000, had a private beneficial arrangement with the Company, which the others did not, if this testimony could establish it. If it tended to establish it, it should have gone to the jury.

The resolution of 30th October was contained in the book of minutes of the Board of Directors. No objection was made to the competency of the proof, nor that the book was not identified, and there is nothing to raise a presumption that it was not a regular official act.

In respect to the questions above quoted and overruled, and the offer of testimony also overruled, it may be observed that all of them, in a greater or less degree, tend to prove some secret arrangement between the Company and some of the subscribers, by which they were to be favored, in respect to their subscriptions, in some manner not common to all. The question put to Mr. Ogden, Vice-President of the International Insurance Company, in respect to his subscription, was a competent and proper question if the object was to call out the existence of such an arrangement, and there could have been no other; but it was ruled out on the ground that it tended to vary, by parol, the terms of the subscription.

The question to same witness, whether the notes of that Company had been given in pursuance of the subscription, was immaterial and improper, except in connection with the other object, and as bearing on that may have been pertinent.

The question to the witness Bainbridge, one of the subscribers, as to whether any and what inducements had been offered to him to make his subscription, was accompanied with an avowal that the counsel proposed to prove that there was a parol arrangement amounting in effect to an agreement that he need not give his notes for his subscription; yet it was ruled out.

The question to Whipple, the agent of the Philadelphia Insurance Company, was directly to the point, whether any parti-

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cular arrangement existed between him and the Atlas Insurance Company in reference to his subscription, and if so, what; but it was objected and ruled out, on the same ground as the others, that it sought to vary the terms of subscription by proof of a parol arrangement.

The question to the same witness, whether the Atlas Insurance Company was indebted to the Philadelphia Insurance Company, was perhaps properly ruled out—certainly it had no significance, as the previous question had been overruled, and yet, as bearing on the main question of fraud, might have been a very pertinent inquiry if that question had been allowed.

The question put to Arrowsmith, a subscriber, whether his subscription was one substituted in the place of the subscription of another party, was made with the avowed object of showing that some of the sums were subscribed by the Trustees themselves, with a parol privilege reserved of procuring other subscribers subsequently in their place, and that the witness's subscription was one which was so substituted. Such an arrangement would give the parties with whom it was made an opportunity of relieving themselves wholly from their subscriptions, if they could procure others in their place. The substituted ones may have been less responsible; at all events it was an advantage which they had which the others did not possess.

It is said, however, that this evidence is all inadmissible, as it tends to contradict the terms of the subscription, which is a written contract.

This objection does not apply to the resolution of 30th October, but if it did my opinion would still be the same. The subscription was not under seal, and parol evidence is always admissible, on the part of the injured party, to show that such an instrument was procured through fraud, where the controversy is between the original parties or those affected by their equities. Even in the case of a deed a parol trust or agreement inconsistent with the face of it, may be proved by a creditor assailing the deed for fraud. Even the parol declarations of a party in possession of land, showing that the deed he holds under is void for fraud, are admissible in an action of ejectment by him against his tenant. A surety in a bond may show he signed it on condition that others should sign it also, and that they did not. (11 Peters, 86.)

It is, in my opinion, no answer to say that the parties who were to be benefited by the secret agreement could not themselves set it up to defeat their own contract, and that therefore it is a mere nugatory agreement. Such a proposition is not universally true.

A party to a note may allege in his defense that it was given to the plaintiff in fraud of a surety, who had become responsible for him on another note given as a compromise of his debts, and which the surety was induced to indorse on the supposition that it was to be in full of the plaintiff's claim against his principal. This was held a perfect defense in *Weed v. Bentley*, (6 Hill, 56,) even in favor of the debtor who was a party to the fraud.

The arrangement by which the note sued upon was given, in addition to the note indorsed by the surety, (and contrary to the assurances made to him that the note he indorsed was to be in full of the debt,) must have been proved by parol.

The cases on this whole subject are very numerous. (Cow. & Hill's Notes, n. 967-969; 1 Phil. Ev., 551; 1 Greenl. Ev., § 284; Chitty Con., 113; 16 Mass., 278; 11 Wend., 533.)

The position that a party to a written contract (executory and not under seal) cannot set up a secret agreement between some other parties to it and the party to whom the obligation is given, and which operates as a fraud on his rights, unless the agreement be also in writing, I do not assent to. Such a rule would always exclude parol evidence of a fraud in such cases.

In *Cecil v. Plaistow*, (1 Anst., 202,) cited by the Chancellor in *Stewart v. Trustees Hamilton College*, at page 419, (2 Denio,) the point of the decision was not that the creditor had got an additional bond, (in fraud of the other creditors,) which he could sue upon, but that there was a secret understanding with his debtor that he should retain the whole original claim, provided he would sign the composition deed for one-half, and thereby induce the other creditors to do the same; and hence the Chancellor says, "Any private agreement or *understanding*" between the debtor and any particular creditor in a composition deed, &c., shall be void as a fraud on the other creditors. Such secret understanding can only be proved by parol.

The point of the fraud in such cases consists not in the fact that a particular creditor has secretly got another security which he may enforce, but that the complaining creditor has been

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induced to come into a legal obligation under a suppression or misstatement of facts, which he ought to have been apprised of, and which, if he had known according to the truth of the case, it is fair to presume he would not have entered into the obligation.

In my opinion, some or all of these questions should have been allowed, and the resolution of October 30 admitted in evidence, and it was error to exclude them. If I am right a new trial ought to be granted.

A question was put to the witness Tracy, the Secretary of the Company, as to what was the amount of the Company's liabilities when it suspended in March, 1856, which was objected to and ruled out. The object of it was to show that the Company must have been insolvent in February preceding, when the defendant's subscription was procured. Had the question been allowed, I should not have deemed it error, nor am I willing to say that it was erroneously excluded. The time within which an inquiry of that nature must be limited, is necessarily a matter of discretion with the Judge.

It was perhaps unnecessary, under the view I have taken in respect to the evidence offered to show fraud on the defendant, to have discussed the other exceptions, but I have done so in order that the counsel may have the benefit of the views of the Court on another trial.

I have not adverted to the question of the plaintiff's title as a *bona fide* holder for value, this Court having already decided in General Term, in April, 1858, on an appeal from the decision of the Referee who first tried it, that the terms of the receipt given for this and the other two notes turned over to them at the same time, did not warrant the Court in holding that the notes were received in absolute payment for the rent, and the evidence on the second trial did not on this subject materially differ from that which was adduced on the first. The case is therefore fairly open to the defenses which were interposed on the trial, and have been discussed herein.

In my opinion there should be a new trial.

WOODRUFF, J., concurred in the conclusion of Mr. Justice HOFFMAN, that the judgment should be affirmed.

Judgment affirmed.

**HARRIS WILSON, Plaintiff and Respondent, v. JOHN DAVOL,
Defendant and Appellant.**

1. A judgment between two persons, determining the title to land which both claim, makes part of the title, runs with the land, and concludes all who derive a title to such land from either of those parties, subsequent to the recovery of such judgment.
2. But it does not bind any person who derives a title from either by a deed or lease executed prior to the commencement of the action in which such judgment was recovered.
3. The perfection of a title, by purchase at a Sheriff's sale on judgment and execution, extinguishes a lease given by the judgment debtor between the time of the Sheriff's sale and the execution of the Sheriff's deed.
(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)
Heard, December 14; decided, December 31, 1859.

THIS is an appeal by John Davol, the defendant, from a judgment in favor of Harris Wilson, the plaintiff, rendered on a trial had before Mr. Justice SLOSSON, without a jury, on the 23d of April, 1857.

The action is brought to recover rent of the house and lot No. 50 Harrison street, Brooklyn, for three quarters, ending, respectively, November 1, 1849, and February 1 and May 1, 1850; which rent the plaintiff claimed as assignee of a lease of the premises from Jacob Carpenter to the defendant, (dated July 22, 1848,) for two years from the 1st of May, 1848, and also as owner of the premises under a title acquired September 18, 1849, at a purchase thereof on a foreclosure by advertisement of a mortgage thereof executed by said Carpenter to one Sarah Loines on the 2d of December, 1844. The allegations of the pleadings, as to such mortgage and its foreclosure, are stated in the opinion of the Court.

The lot 50 Harrison street is mainly on a lot numbered 75 on a map produced at the trial, and is partly on the adjoining lot, having the map number 76.

The lots, map Nos. 75 and 76, were sold by the Sheriff of Kings county on judgments (being liens thereon) and executions against said Jacob Carpenter on the 15th of December, 1847, and were conveyed by the said Sheriff, by a deed dated March 16,

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1849, to Sylvanus B. Stilwell, as a judgment creditor of Carpenter, who had duly redeemed the premises so sold.

Davol claimed to hold under said Stilwell from and after the 1st of May, 1849, and refused to pay rent to Carpenter subsequently thereto. It was found, as a fact, that Davol was notified by Stilwell of the said conveyance to him from the Sheriff two or three days after it was delivered, and then agreed to pay, and subsequently did pay, to Stilwell the rent of the premises until the expiration of said lease.

On the 7th of May, 1850, Carpenter assigned said lease to the plaintiff, and all rents accruing under it since October 1, 1849.

On the 14th September, 1850, an action was tried in the City Court of Brooklyn, between the said Jacob Carpenter, plaintiff, and the said Sylvanus B. Stilwell and Isabella Ambrose, defendants, for the recovery of the possession of a lot of ground in Court street, Brooklyn, one of the pieces of property described in said deed of the 16th March, 1849, from the Sheriff of Kings county to said Stilwell. In that action the validity of said deed was passed upon, and the same was adjudged to be void, and judgment was rendered for the plaintiff in said action; which judgment was subsequently affirmed by the Court of Appeals.

To prove the fact of such recovery, and thereby to establish the invalidity of said Sheriff's deed, the plaintiff produced the record of the judgment in the last named action, and the defendant objected to its admissibility as evidence, and excepted to the decision admitting it. The record did not show when such action was commenced. The summons in it is dated "August, 1849;" the complaint in it is verified August 6, and the answer August 31, 1849. It was tried September 14, and judgment was perfected November 14, 1850. That judgment was affirmed by the Court of Appeals in 1854.

The Judge, on the trial of this action, held that Stilwell acquired no title under the deed of the 16th of March, 1849, "and that the defendant is bound by the aforesaid decision (of the City Court of Brooklyn) in relation to said deed;" to which decision he excepted.

The printed Case states the reversal by the Supreme Court of the judgment of the City Court of Brooklyn, and refers to *Carpenter v. Stilwell*, (12 Barb., 128;) and also states the reversal by

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the Court of Appeals of the judgment of the Supreme Court and affirmance of that of the City Court of Brooklyn, and refers to *Carpenter v. Stilwell*. (1 Kern., 61.)

Judgment was given for the plaintiff for the three quarters' rent, with interest and costs; and from that judgment the present appeal is taken.

J. Greenwood, for appellant.

1. The complaint alleges that the lot No. 75, embracing nearly the whole of the demised premises, was sold to the plaintiff under foreclosure of a mortgage made by Carpenter prior to the lease to the defendant Davol. This sale extinguished the lease as to all of the demised premises comprised in that lot. (*Simers v. Saltus*, 3 Denio, 214.)

The plaintiff, having alleged this fact in his complaint, cannot now deny it for the purpose of enabling him to recover upon the lease.

II. After the foreclosure and sale of the mortgaged premises, no relation of landlord and tenant existed as between Carpenter, the lessor, and the defendant Davol, and the assignment of the lease in May, 1850, by Carpenter to the plaintiff, carried with it no right to recover rent claimed to be due on and subsequently to November 1, 1849.

III. The title of Stilwell, under the Sheriff's deed of the whole of the premises, was perfect, and the attornment by the defendant to him was therefore legal. The only evidence offered to impeach this is the judgment roll in the case of *Carpenter v. Stilwell and Ambrose*, in the City Court of Brooklyn, which is not evidence against the defendant in this case. (*Jackson v. Rowland*, 6 Wend., 666; *Nellis v. Lathrop*, 22 id., 121.)

1. It is a record of a judgment on ejectment for other premises, and between other parties. (*Lawrence v. Hunt*, 10 Wend., 80; *Jackson v. Wood*, 3 id., 27; *Snyder v. Sponable*, 1 Hill, 567.)

2. It does not appear from the record itself, nor from any proof *aliunde*, that the validity of the Sheriff's deed was passed upon. (*Gardner v. Buckbee*, 3 Cow., 120; *Burt v. Sternburgh*, 4 id., 559; 10 Wend., 84; 1 Greenl. Ev., §§ 528, 529.)

The judgment should be reversed.

J. W. Gilbert, for respondent.

I. The plaintiff, as the assignee of the lease, is entitled to recover any rent that became due subsequent to the 1st of October, 1849, although his title to the reversion accrued subsequently. (2 R. S., 4th ed., 154, § 17.)

1. This assignment was valid. It is an assignment of the agreement to pay the rents, &c.

There was no adverse possession: Davol was in possession under his lease from Carpenter. He claimed in no other way. Although Stilwell had acquired the Sheriff's deed, he never took possession, or attempted to take possession. The case shows that an arrangement was made by which Davol was to pay him the rent. The lease was recognized, and hence the rent was agreed to be paid upon being indemnified.

2. Carpenter had a valid claim for the rent due upon the lease, except so far as the plaintiff had acquired it by his purchase of the premises.

Stilwell, by his purchase, or under the Sheriff's deed, acquired no right whatever. (*Carpenter v. Stilwell*, 1 Kern., 61.)

3. The plaintiff, therefore, as assignee of Davol's agreement, became entitled to all the rent falling due subsequent to 1st October, 1849. For this he recovered against Davol, and that recovery should not be disturbed.

4. The attornment to Stilwell was a nullity. (3 Denio, 216; 2 R. S., 3d ed., 29, § 3.)

II. The judgment in the City Court was a perfect estoppel.

BY THE COURT—BOSWORTH, Ch. J. The defendant cannot claim on this appeal that the mortgage on lot No. 75 had been foreclosed, and the lot purchased by the plaintiff, prior to the accruing of the rent which this action is brought to recover.

No such fact is found by the Court nor was proved at the trial; no such fact is admitted by the pleadings.

It is true that the complaint alleges the making of the mortgage; default of the mortgagor; a foreclosure of the mortgage, and a purchase of lot No. 75 by the plaintiff. But the defendant in his answer controverts the allegation of the mortgagor's default, and charges that the mortgagee, (in the endeavor to foreclose by advertising under the statute,) did not advertise accord-

ing to the statute, "and that notice of such sale was not duly advertised."

Such being the pleadings, and no evidence having been given of any proceedings to foreclose, the case stands as if the fact of such a foreclosure had not been alleged.

The lease from Carpenter to Davol was for two years from the first of May, 1848. This action is to recover three quarters rent of the premises, ending November 1, 1849, and February 1, and May 1, 1850. This lease and the rents due from Davol as such lessee have been assigned to the plaintiff.

Davol resists the plaintiff's claim on the ground that lot No. 75 and the adjoining lot had been sold by the sheriff of Kings county, on executions against Carpenter, issued on judgments recovered prior to the date of the lease from him to Davol, and that S. B. Stilwell received, as a judgment creditor redeeming from the purchaser at said sale, the Sheriff's deed on the 16th of March, 1849. That Davol, subsequently thereto paid rent to said Stilwell, as the owner of lot No. 75, by a title thus acquired.

To this it is answered, that in September, 1850, an action was tried which Carpenter had commenced against Stilwell, to recover the possession of another lot in Brooklyn conveyed by the Sheriff's deed before mentioned and sold under the same executions as the one in question; that the validity of such deed, and of the title thereby acquired, was a point in judgment; and that it was held to be invalid.

The Court at Special Term found these latter facts to be true. As we read the case, *Carpenter v. Stilwell*, (12 Barb., 128, and 1 Kern., 61,) and the reports thereof, were read in evidence by consent, for the purpose of showing thereby what questions were litigated and determined in that action.

If this view be correct, these reports show that the act of the Sheriff in selling upon the executions on which the sale was made, which is the basis of Stilwell's title, and the deed given to carry such sale into effect, were adjudged to be without authority and void.

The only material question left is, whether the judgment in the suit between Carpenter and Stilwell, and the trial and determination of those questions in that suit, are conclusive against Davol in this suit, that Stilwell had no title.

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The Court held, as a conclusion of law, "that the defendant is bound by the aforesaid decision in relation to said deed." To this decision the defendant duly excepted.

The Sheriff's deed to Stilwell is dated on the 16th of March, 1849. Davol claimed to hold under Stilwell from and after the 1st of May, 1849, and refused to pay rent to Carpenter subsequently thereto.

The action between Carpenter and Davol, in which it was determined that the deed of the 16th of March, 1849, was void, was tried on the 14th of September, 1850. It was not found at Special Term when that action was commenced. The summons in it is dated "August, 1849," and the complaint in it was verified "August 6, 1849." It may be assumed, therefore, that it was commenced after the 1st of August, 1849, several months subsequent to the time when Stilwell apparently acquired the legal title, and several months after Davol recognized him as the owner and agreed to pay rent to him.

To make the judgment in the action between Carpenter and Stilwell evidence against Davol in the present action, it is indispensable that the former action should have been commenced, if not determined, prior to the time when the agreement between Stilwell and Davol was concluded, and the rights which the latter acquired thereby had become fixed. (*Campbell v. Hall*, 16 N. Y. R., 580.)

The act, or proceeding, relied upon as an estoppel, must have been done, or been had, prior to the time when the defendant acquired the title which is claimed to be affected and bound thereby.

A judgment between any two parties, determining the title to land which both claim, makes part of the title, runs with the land, and concludes all who derive a title to the land from either of those parties subsequent to such judgment. But it does not bind any person who derives title from either, by a deed or lease executed prior to the commencement of the action in which such judgment was rendered. (*Campbell v. Hall*, *supra*, and the cases there cited.)

It was, therefore, erroneous to hold that the judgment in the action of Carpenter against Stilwell and Ambrose bound Davol.

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The title of Stilwell under the deed of the 16th of March, 1849, assuming it to be valid, extinguished the title of Davol as lessee of Carpenter. That lease was made after the sale by the Sheriff of the premises thus leased. The sale by the Sheriff was made on the 15th of December, 1847, by virtue of executions on judgments docketed the 11th of March, 1846.

Stilwell, having become the absolute owner, by virtue of the Sheriff's sale and Sheriff's deed, had a right to the immediate possession of the premises; and Davol might lawfully agree to occupy as his tenant and to pay rent to him.

The Judge at Special Term did not find, as a fact, that the Sheriff's deed was void, nor was any evidence given upon that point beyond the introduction of the record in the suit between Carpenter and Stilwell, and proving that in such suit it was adjudged to be void.

In the present action it is open to the parties to litigate that question upon such competent evidence as either may offer; and the defendant is not bound by the decision and judgment in the action between Carpenter and Stilwell. (*Thomas v. Hubbell*, 15 N. Y., 405-409.)

It follows that the judgment must be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

EBENEZER K. LAKEMAN and others, Plaintiffs, v. MOSES H. GRINNELL and others, Defendants.

1. When goods were purchased in Connecticut by persons doing business at Liverpool, England, to be delivered by the vendor on ship board in New York, and were so delivered on board the defendant's ship, then bound for Liverpool, and were received by the defendants for transportation to Liverpool, and a receipt given therefor specifying the price of freight; but before bills of lading were delivered or executed, and before the ship sailed, she was destroyed by an accidental fire at the wharf without any actual negligence of the defendants, and the goods were burned: *Held*, that the defendants were liable as common carriers for the loss of the goods.

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2. The measure of damages where goods are lost before the ship of the carrier leaves the port of lading, is the value of the goods at that port, and the plaintiff is not entitled to the value at the port of destination less the cost of transportation.
3. Where goods intrusted to a common carrier for carriage, are lost by accident without any actual negligence on his part, the plaintiff is not entitled to recover interest on the value of the goods, not even from the time of the commencement of suit.

(Before HOFFMAN and SLOSSON, J. J.)

Heard, November 14th; decided, December 31st, 1859

ACTION to recover from the defendants, as common carriers, the value of goods destroyed by fire, after delivery to the defendants for carriage.

The plaintiffs purchased at New Haven, Connecticut, a quantity of India rubber slippers and sandals to be shipped to them at Liverpool, in England, the vendor to deliver them on ship board at the city of New York.

The vendor forwarded the goods to New York, addressed to the plaintiffs at Liverpool, and his agents delivered them on board the ship *Henry Clay*, belonging to the defendants, then bound for Liverpool, and the same were shipped on the 3d and 4th days of September, 1849; the agent of the defendants received the same on board to be carried from New York to Liverpool, and delivered a receipt therefor specifying the price of freight. The ship was at that time employed by the defendants in the transportation of goods for hire between New York and Liverpool, in England, and they had then advertised her as up for freight and passage on a voyage to Liverpool.

On the next day, (September 5th,) and before any bills of lading for the goods had been delivered or executed, the ship was destroyed by fire at the wharf, and the plaintiff's goods were totally destroyed. It was conceded that the plaintiffs had no proof of actual negligence, and did not charge the defendants with actual negligence by reason of which the fire occurred.

The value of the goods in New York was at that time \$4,685.27.

The value of the goods in Liverpool, the port of destination, was \$8,054.18; the amount of the freight and duty which should be deducted if that valuation was decided to be the measure of damages was agreed upon.

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The case had been previously tried, and on appeal to the Court of Appeals, that Court decided that the defendants were liable under such circumstances as common carriers, although the loss occurred from fire, which was purely accidental, and happened before the voyage was begun and before bills of lading were signed.

The present trial was to determine the amount which the plaintiffs were entitled to recover, and was had before Mr. Justice SLOSSON and a jury, on the 20th of May, 1859.

The plaintiffs' counsel requested his Honor, the presiding Justice, to charge the jury that the plaintiffs were entitled to recover the value of the said goods at the port of destination, with interest.

The said Judge refused so to charge, and the plaintiffs' counsel duly excepted.

The said Judge then charged the jury that, inasmuch as no fault was imputed to the defendants, and the goods were destroyed before the departure of the ship, and this was known to the plaintiffs, that the plaintiffs were only entitled to recover the value of the said goods at the port of New York; to which charge the said plaintiffs' counsel duly excepted.

The said Judge further charged the said jury, that the said plaintiffs were not entitled to recover interest on the value of the said goods; to which charge the plaintiffs' counsel also duly excepted.

The jury then rendered a verdict for the plaintiffs for the sum of \$4,685.27.

His Honor the Judge, then directed the said exceptions and all the questions of law to be heard in the first instance at a General Term, on a Case to be made, with leave to either party to turn the same into a bill of exceptions.

Richard Goodman, for plaintiffs.

I. By the decision of the Court of Appeals, affirming the law as it has existed for centuries, the defendants were common carriers, and responsible for the loss of the plaintiffs' goods.

They advertised to carry goods for hire, from New York to Liverpool, England, and received the plaintiffs' goods for such voyage.

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II. The measure of damages is the value of the goods at the port of destination, at the time they would have arrived, with interest.

Such value was proved on the trial. (Sedgwick on Meas. of Damages, 370; *Gillingham v. Dempsey*, 12 S. & R., 188; *Watkinson v. Laughton*, 8 J. R., 213; *Elliott v. Rossell*, 10 id., 1; *Bracket v. McNair*, 14 id., 170; *Amory v. McGregor*, 15 id., 24; *Dana v. Fiedler*, 2 Kern., 40; *Joshua Baker*, 1 Abb. Ad. R., 215; *Gold Hunter*, 1 Blatch. & H., 310.)

III. The verdict should be set aside, and a new trial granted.

Daniel Lord, for defendants.

I. 1. Where, by an event importing no fault, the ship and goods are lost at the place of lading, the cost price or value at that place is the measure of the liability of the carrier. (*Wheelwright v. Beers*, 2 Hal l R., 391; *Smith v. Richardson*, 3 Caines R., 219; See also from Spencer, 8 Johns. R., 215; *Watkinson v. Laughton*.)

2. The cases where the rule adopting the price at the port of destination is applied are uniformly cases where the voyage has been proceeded on, and the goods carried away from the port of lading. (*Watkinson v. Laughton*, 8 John. R., 213; *Elliott v. Rossell*, 10 id., 1; *Bracket v. McNair*, 14 id., 170; *Amory v. McGregor*, 15 id., 24.)

3. When the ship and cargo are both lost before proceeding on the voyage, the cost or home value is the only certain rule, and it affords an exact indemnity.

To give the value abroad involves speculative inquiries into price abroad, without the presence of the goods themselves, into the time of probable arrival abroad, into the fluctuations of the current market, into the duties abroad, and into the foreign charges.

But the domestic value rests upon the actual cost, ascertainable by direct positive evidence, and is the sum with which the lost goods may be replaced.

II. 1. Where a carrier is held liable, the allowance of interest is in the discretion of the jury, and not a legal right in the shipper, where there is any question of negligence.

And where there is no question of negligence made, interest is not by law to be allowed. (*Watkinson v. Laughton*, 8 Johns.

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R., 213; *Bracket v. McNair*, 14 id., 170; *Amory v. McGregor*, 15 id., 24; *Richmond v. Bronson*, 5 Denio R., 55; Sedgwick on Damages, 357, 2d ed.)

2. This is in conformity with the law in the allowance or not of interest on unliquidated demands, in the absence of fault or agreement to pay interest. (*Rensselaer Glass Factory v. Reid*, 5 Cow., 587; *Doyle v. St. James Church*, 7 Wend. R., 178; *Tucker v. Ives*, 6 Cow. R., 193; *Van Beuren v. Van Gaasbeck*, 4 id., 496.)

3. The liability of the carrier for a loss like the one in question, is founded on mere positive law, similar to a statutory penalty or liability. It is not founded on equitable considerations, and is now limited by act of Congress. (U. S. Stat., March 3, 1851.)

Nothing is to be added to it by any implication.

The verdict should not be set aside.

SLOSSON, J. 1. There is no question on the authorities but that the common carrier who has received goods for transportation and has actually performed the journey or voyage, is, in case of non-delivery of the goods, unless the failure to deliver is excused by the act of God, or perils of the sea, liable, as a general rule, for the value or price which they would have brought at the port or place of destination, if they had been delivered according to the contract.

The defendants' counsel, however, insists that it would be unreasonable to adopt the valuation at the place of destination, when the goods have never left the place at which they were received by the carrier, but have been destroyed at such place by some cause other than the carrier's own negligence, and insists that in such a case the value of the goods, at the place where they were received by the carrier, is the true rule both in principle and on authority.

The case of *Wheelwright v. Beers*, (2 Hall's Sup. Ct. R., 391,) is relied on. The defendant had undertaken to transport the plaintiff's goods from New York to Omoa, the vessel was forced by stress of weather into Norfolk, where she was found so much damaged that she was sold and the voyage broken up. A part of the plaintiff's goods was also sold, and the residue shipped

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back to him at New York and there sold. The loss on these sales was \$1,000. On the trial the plaintiff proved what the goods would probably have brought at Omoa, and contended that he was entitled to recover according to such foreign valuation. Chief Justice JONES who tried the cause reserved the question of damages for the consideration of the Court, and the jury, under the direction of the Judge, assessed both values, that is, first, the difference between the invoice prices of the articles shipped and the net amount of the sales of the same articles after they were delivered to the plaintiff; and, second, the difference between the net amount of said sales and the prices which the articles would have brought at Omoa. The first they found to be \$1,000 and they estimated the loss of the market at Omoa to be \$1,500, and gave a verdict for the plaintiff for \$2,500. When the case came before the Court in Bench, Judge OAKLEY gave an opinion in favor of the valuation at the place of destination. The Court, however, did not agree with him, and the Reporter adds: "That part of the foregoing opinion which relates to the rule of damages was the opinion of Judge OAKLEY merely, and not that of the Court. The Court gave judgment in favor of the plaintiff for \$1,000, being the difference between the actual sales and the invoice price of the goods, the loss of the market at Omoa being deducted from the verdict of the jury. The loss on the sale of the goods at Norfolk and New York was considered as the true rule as to damages, upon the ground that there was *no fault or fraud* on the part of the defendant from which the loss arose, and that the case showed only a breach of the implied warranty of sea-worthiness."

This case is important, not only as showing that the valuation at the port of departure may be a proper measure of damage, even where the vessel has undertaken and partly prosecuted the voyage, but as also showing that in cases of this nature, where the action essentially sounds in damages, the good conduct or fault of the carrier may enter into the consideration of whether the valuation should be fixed according to the home market, or the market at the port of destination.

The case of *Smith & Delamater v. Richardson*, (3 Caines, 219,) is also relied on. It was brought to recover damages for the breach of the defendant's contract, he having undertaken to con-

vey the plaintiffs' goods, consisting of staves, from a point in the State of New York to a place near Montreal, in Canada, and wholly failed to perform his agreement, by reason of which the plaintiff had been obliged to effect the transportation himself, in the course of which the goods were lost on the St. Lawrence. The Referees, to whom the case had been sent, gave the plaintiff the full value of the property which it would have brought in the Montreal or Quebec market; and on a motion to set aside their report, it was contended that at the utmost the defendant could only be made liable for the value of the staves "on the spot where they lay;" and so the Court held, putting their decision on the ground, however, that the price in the Montreal or Quebec market was "too uncertain and unreasonable to be admitted as a rule of damages."

In *Watkinson v. Loughton*, (8 Johns. R., 213,) where goods had been embezzled during the voyage, and in which the valuation at the place of delivery was held to be the rule, the case of *Smith & Delamater v. Richardson* was relied upon as conclusive on the rule of damages; but the Court held that case not to be applicable, "as that was not a case of loss arising from the *fraud, negligence or misfortune* of the carrier in the performance of his trust, for the defendant there *never entered on the undertaking*, and the suit was for a breach of contract in not carrying, and the plaintiffs afterwards became their own carriers and lost the goods," and they held that there might be a material difference between the two cases as to the reason and policy of the rule of damages, the case before them being one of embezzlement of part of the goods in the course of the voyage.

The case of *Dusar v. Murgatroyd*, (1 Wash. C. C. R., 13,) resembles the one now before us most nearly in its circumstances. After the goods had been put on board for a foreign port, and before the vessel left the wharf, she nearly filled with water, in consequence of which the plaintiff's goods were damaged to about one-half their value; and the Judge charged the jury that the rule of damages was the difference between the prime cost and charges, and the sales at the place of shipment.

In the case of *Bridge v. Austin*, (4 Mass. R., 115,) the defendant had received the plaintiff's goods on board his vessel at Boston, to transport to Charleston, under a special agreement to sell on

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his account and to account for the proceeds. The goods arrived at Charleston, and were there stored by the defendant, but before they were sold were stolen. The rule of damages adopted by Chief Justice PARSONS, was the value of the goods at Boston when shipped, less the five per cent commissions stipulated for in the special agreement.

I should be unwilling to make the negligence or good conduct of the carrier the sole test by which to determine the measure by which to assess the plaintiff's damages in a case of this kind. Apart from the difficulty of proving negligence or fraud on the part of the carrier, the burden of doing which would, by such a rule, be thrown on the plaintiff—an objection pointedly alluded to by the Court, in *Watkinson v. Laughton*—it would be introducing as decisive, in the computation of damages, a consideration which, if properly admissible at all, which I do not deny, is nevertheless not necessarily connected with the principal, if not the only object of damages in such a case, to wit, pecuniary indemnification to the plaintiff for his loss.

The case of *Delamater & Smith v. Richardson* does not adopt such a test, though the Court in *Watkinson v. Laughton*, refer to the absence of fraud, negligence or misfortune, in that case, as one of the distinctions between it and the case then before them.

The true test, I apprehend, is what will furnish the plaintiff a full indemnity. If the value of the articles, according to the invoice price, will fully compensate for the loss, that price should govern. If the value in the place where the goods were to be delivered is necessary to furnish a complete remuneration, that should be adopted; and hence the question whether the goods are lost in the place where they are received by the carrier, or in the place at which they were by the contract to be delivered, may become one of the last importance. I say *may* become, because I do not think that that is necessarily decisive in all cases; for I can well imagine a case in which the goods are lost in the port of departure, in which, from an impossibility of procuring other articles of the same kind, or from other causes, the value at the port of destination would furnish the only adequate indemnity to the plaintiff. In such a case it ought, except under special circumstances, to be adopted. But if the goods could be immediately replaced at the same price, and sent forward by

another vessel, it would be unreasonable to give the plaintiff the profits he might have made if the goods had not perished and the first shipment had been successful.

This furnishes a safe and a righteous rule, and divests the question of damages of the penal character which it would have if the good conduct of the carrier were the sole test. This is the reason why, when the vessel has arrived at the port of destination, the value of the missing goods at that place is adopted. No other rule could compensate. So, if the vessel should perform but a portion of her voyage, and the goods are sold or lost by act of the carrier at an intermediate port, as in the case of *Wheelwright v. Beers*, in 2 Hall's Reports, the value at the port of destination might well be given if the plaintiff was unable to replace the goods at the intermediate port and forward them on; as, on the other hand, the invoice price which was adopted in that case would be proper, if, under the peculiar circumstances of the case, that would furnish a complete indemnity.

It follows that whether the carrier has been guilty of negligence or fraud; is not the only test, nor whether the voyage has been begun or not; but whether the market price at home, or the price at the port of destination, furnishes the true and perfect indemnity, and this may depend on a variety of circumstances.

The cases which are cited to prove that the valuation at the place of delivery is in all cases of non-delivery to be adopted, do not, in my judgment, establish that position, but they do establish that, when that value is necessary to a complete indemnity, it shall be adopted. (*Watkinson v. Laughton*, 8 J. R., 218; *Amory v. McGregor*, 15 id., 24; *Bracket v. McNair*, 14 id., 170; *Brondt v. Bowlby*, 2 Barn. & Ad., 932; *Gillingham v. Dempsey*, 12 Serg. & Rawle, 188.)

In all these cases, except that of *Bracket v. McNair*, the vessel had arrived at the port of destination. In that case there was an entire failure to perform the contract at all. The case is not very fully reported. The defendant agreed, on the 19th of August, 1809, to transport 400 barrels of salt for the plaintiff, from Oswego Falls to Queenston, in Canada. On the 30th August news arrived at Oswego of the non-intercourse act of the United States. In the *interim* the vessel had sailed without the salt, and the difference between the value of the goods at Queenston on

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1st September and their value at Oswego, was allowed as the damages. It is quite clear, though the case does not assign that as the reason, that, by reason of the defendant's vessel having sailed without the salt, the plaintiff, from the intervention of the non-intercourse act, had lost his opportunity of getting it to Queenston at all, and hence the difference between the two values was the only measure which would give him full indemnity.

In the case now before us the vessel was accidentally destroyed by fire, while lying at the wharf, the day after the plaintiffs' goods were put on board, and before the day on which she was to have sailed. The question then is, how the plaintiffs can be perfectly indemnified for this loss. Unless, in the absence of all proof on the subject, we are to assume that the plaintiff could not, in the port of New York, or by sending to Connecticut where these goods were purchased, have procured other goods on that day, or within a reasonable time afterwards, of the same quality and at the same price, and further assume that no other means of transporting the goods to Liverpool could have been procured in this port within a reasonable time of the day on which the *Henry Clay* would, but for her destruction, have sailed, neither of which presumptions can, I think, be reasonably entertained, we must hold that, so far as the valuation of the goods is concerned, the value in this port, at the market price, was the true measure of damage as giving a full indemnity.

This is laying out of view, as affecting the question in the present case, the conceded fact that the defendants were without fault in respect to the calamity by which the ship and goods were destroyed. I think the case clear, without taking that into consideration, but I do not intend when I say that the conduct of the carrier, his innocence or his fault, should not be the sole test in determining this question, to be understood as saying that these considerations are never to be taken into the account by the jury in deciding whether the value of the goods shall be determined by the home or by the foreign market. On the contrary, as the liability of the carrier arises, in part at least, from a duty imposed on him by law, it might under some circumstances be wholly inequitable to impose on him, in addition to the actual value of the property at the time of the loss, the loss of the adventure itself, even if that were necessary to a complete indemnity.

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And I am not prepared to say that in a case like the present, in which, without any imputation of negligence on the part of the defendants, their vessel was accidentally destroyed by fire within a few hours after the goods were received on board, we should not consider it inequitable and unjust to impose on them a higher rate of damage than the invoice price or home valuation of the goods, if that were not sufficient to give a perfect indemnity. But we are relieved from all doubt on the latter point by the consideration that the goods were lost in the port of New York, between which and Liverpool communication is almost daily, and by the fact that there is nothing in the evidence to raise a doubt that the goods might have been immediately replaced at the same price at which they had been purchased.

Second. Ought interest to be allowed? The plaintiffs contend that it ought to be allowed as matter of law, or that at least the question should have been submitted to the jury.

The defendants contend that there being no negligence on the part of the carrier, interest ought not as a matter of law to be allowed; in other words, that the jury was properly instructed, that the plaintiffs were not entitled to interest.

In the case of *Smith & Delamater v. Richardson*, (8 Caines R., 221,) the Court held that interest ought not to have been allowed, but give no reason for disallowing it. There was a clear breach of duty on the part of the defendant, but the case presented this novel feature, that the plaintiffs on the defendant's default, had taken the goods and undertaken to transport them themselves; and the Court in its opinion says it is questionable whether the entire loss of the property was not attributable to the imprudence and default of the plaintiffs. The Court in withholding interest may have been governed by this peculiar circumstance of the case.

In *Watkinson v. Laughton*, (8 J. R., 213,) the Court held that the question of interest depended on circumstances; that the jury might give it by way of damages in cases in which the conduct of the carrier was improper, and as no bad conduct was to be imputed to him in that case, they gave the valuation at the port of destination without interest.

The goods had been embezzled in the course of the voyage without any fraud on the part of the defendant. The plaintiff

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claimed the value of the missing goods at the place of destination with interest. The defendant contended that he was liable only for the invoice price without interest. A verdict was taken for the plaintiff for the valuation at the port of delivery with interest, but subject to the opinion of the Court, which by agreement of parties was to fix the amount of the verdict according to valuations agreed upon, and with or without interest as it might deem right.

The Court disallowed the interest on the express ground that no bad conduct was imputable to the defendant.

In *Amory v. McGregor*, (15 J. R., 24,) the Court held that the question was one for the jury, to be decided according to their views of the defendant's conduct. "If there was any fraud or gross misconduct attending the transaction, (say the Court,) interest ought to be allowed," and they refused to allow it in that case, because the defendants were not chargeable with any such misconduct.

In *Richmond v. Bronson*, (5 Denio, 55,) the Judge at the trial had instructed the jury that the plaintiff was entitled to interest as a matter of law. The Court said that the case was precisely like *Watkinson v. Laughton*, and held that such instruction was erroneous; that in actions against carriers, interest was never allowable as matter of law; but it was for the jury to say whether it should be allowed, in order that they may do justice according to the circumstances, giving as a reason for this that "the loss of the goods may have been matter of accident, without any willfulness or intentional misconduct on the part of the carrier."

I think it would be hardly logical to infer from this case that where it was conceded that there was no fault on the part of the carrier, the jury might still give interest; on the contrary, when the Court in this and the two former cases say it is a question for the jury, they mean undoubtedly that when the whole case goes to the jury on disputed facts, and the question of negligence is one for them to pass upon, the giving or withholding interest should be wholly left to their discretion, according as they might find the case to be, either one of neglect on the part of the carrier, or the contrary, giving interest where the carrier is in the wrong, and withholding it where he is wholly innocent. I can-

not draw any other deduction from these cases. Though in the two cases in *Johnson*, the verdict was taken subject to the opinion of the Court, and the Court, sitting as a jury, refused the interest, it was still a judicial determination of the test by which to determine the propriety of allowing it, and the misconduct of the carrier was in both cases adopted as that test.

In most cases, interest when allowed is given, in part at least, upon some idea of an equivalent already received by the defendant, in the use of the money or property withholden. Hence it is allowable, even in trover, but as against a carrier, in whose hands goods have been lost, or, as in the present case, wholly destroyed without any fault whatever on his part, no such principle can be invoked. It is impossible that he should have received any advantage whatever from the possession of the goods.

But it is said interest should be allowed at least from the commencement of the suit, because as the defendants were always liable for the value of the goods, they have had the use of the money, which, as such value, represented the goods since that time.

That is very true, and if the plaintiffs had demanded by their action no more than the Court now adjudges them to be entitled to, and the defendants had refused to pay it, it might perhaps be some reason for now allowing interest; but the plaintiffs have always claimed the valuation in Liverpool, and this the defendants have always contested, and have now succeeded in establishing a different valuation. Why, then, should they now be compelled to pay interest?

Upon the whole, we think the charge of the Judge was correct on both propositions.

A new trial should be denied, and judgment must be for the plaintiffs for the amount of the verdict.

HOFFMAN, J. The question whether interest was chargeable, appeared to me at first to be plainly against the defendants. The responsibility of the defendants to the plaintiffs was fixed by the law, as the Court of Appeals has decided. The value of the goods shipped was capable of prompt and accurate liquidation upon the home price, and of very little difficulty upon the basis of the value at the place of destination. The defendants thought proper to raise again an important question of commercial law,

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of great personal interest to themselves. They have kept the plaintiffs out of their money until that question was ruled against them. The decision was, that they were responsible, and ought to have paid at once. The plaintiffs will not obtain their full indemnity if they are deprived of interest from the time they should have received the amount, and the defendants have had an advantage in the retention of money which they should then have paid over.

The case of *Dana v. Fiedler*, (2 Kern., 40,) appeared to me to involve a principle which would authorize the charge of interest in the present case, and to make this charge a matter of legal right, not a case for submitting it to the discretion of a jury, to allow it or not, according to circumstances, and their judgment upon them. The cases in which the action is simply *ex delicto*, of which *Walrath v. Redfield*, (18 N. Y. R., 457,) is an example, seemed plainly distinguishable. (See also *The Gold Hunter*, 1 How. & Blatchf., 300; *McGregor v. Kilgore*, 6 Ohio R., 143; 6 Ham., 358, 361.)

But the case of *Watkinson v. Laughton*, (8 Johns. R., 213,) holds that where the carrier is free from fault, he cannot be charged with interest on the value of goods lost or destroyed while in his custody. The interest which the jury had added to the value of the goods was disallowed by the Court, and the amount of the verdict reduced. The rule thus stated has received some confirmation or recognition in *Amory v. McGregor*, (15 John. R., 24-38,) and in *Richmond v. Bronson*. (5 Denio, 55-57.)

I feel bound to yield to these authorities, and not at liberty to disregard them upon the mere strength of my conviction, that the principles which later cases contain, and which may be deduced by reasoning from later decisions, tend to show that the rule ought not to exist, and probably will be overruled by the Court of Appeals in carrying out its own doctrines in *Dana v. Fielder*, (2 Kern., 40.)

I must consider, therefore, the ruling of the Judge in this particular to be correct.

2. The next important question is, whether the damages shall be estimated according to the value of the goods at the port of destination, Liverpool, or at the port of shipment, New York. The difference is \$3,368.91 of principal. The goods were shipped

on the 3d and 4th of September, 1849, in New York, and the fire occurred on the 5th of that month. The ship was to have sailed on the 6th.

The leading case in our Courts, that of *Watkinson v. Laughton*, (8 J. R., 213,) is one where the vessel had arrived at the port of destination, and part of the goods had been embezzled without the fault of the captain. The net value at that port was the standard adopted.

In *Amory v. McGregor*, (15 John. R., 24,) the vessel was on her voyage when the capture took place, from which the loss of the goods arose. The case of *Watkinson v. Laughton* was recognized as governing the question before the Court.

In *Bracket v. McNair*, (14 John R., 170,) the defendant had neglected, without good reason, to transport the salt as he had contracted to do. The difference of the value at the place to which it was to be carried, and the value at its place of intended shipment, was allowed.

Delamater v. Richardson, (3 Caines' R., 219,) is not of much bearing upon the question, as the case turned much upon the fact that the staves were taken by the plaintiffs, and transported at a dangerous season of the year.

In the case of *Arthur v. The Cassius*, (2 Story's R., 81,) the goods had arrived at the port of destination; the consignee refused to receive them; the master was held bound to have landed them there. His conduct was suspicious: there was misconduct on his part.

In *Wheelwright v. Beers*, (2 Hall's R., 391,) the goods were shipped at New York for Omoa, and the vessel was driven into Norfolk. Portions of the goods were sold there, and other portions brought back to New York and sold. The rule of damages adopted by the Court (JONES, Ch. J., and HOFFMAN, J.,) was the difference between the amount of the total sales and the invoice price at New York. Mr. Justice OAKLEY alone advocated the rule of the difference between the prime cost and the net value at the port of destination. The jury had found a verdict of \$2,500, estimating the loss of the market at Omoa at \$1,500. The recovery was but for \$1,000. The invoice was \$3,744. The sales must have been \$2,744, as the difference was \$1,000.

This case seems to me to involve the proposition that if all the goods had been brought back to New York and sold there, the

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difference between the proceeds and the prime cost would have been the rate of damages. If so, the case is strong to show that, when all the goods have been lost in the port of New York before starting, the prime cost is the true rule.

The case of *The Tribune*, (3 Sumn. R., 144,) appears to be in favor of taking the port of lading as furnishing the standard of value, but is by no means decisive.

In *The Gold Hunter*, (1 Howl. & Blatch., 300,) portions of the goods, shipped at Havre for New York, were plundered or consumed on the passage, and part sold to raise money for repairs at Halifax, a port of distress. It was held that the market value at New York of the goods lost was to be recovered, with interest. *Watkinson v. Laughton* was referred to. The vessel arrived at New York.

The case of *The Joshua Barker*, (1 Abb. Adm. R., 215,) was of a peculiar character. The cargo of flour was put on board a vessel at Albany, to be carried to New York. The vessel capsized at the wharf. The cargo was taken out damaged, and immediately sold by the carriers without waiting for orders from New York, which could have been received in a few minutes by telegraph, and in forty-eight hours by regular mail. The vessel itself was pumped out, and arrived at New York in a week after the accident. The value of the goods at the latter place, on the day of arrival, was adopted as the measure of damages, deducting freight and charges and adding interest. The interest was allowed as the appropriate recompense for the fault or misconduct of the party.

In *Dusar v. Murgatroyd*, (1 Wash. C. C. R., 13,) goods shipped to be transported to Hamburg were damaged in the port of shipment. The Judge charged: "The profit which might have been obtained if the sugars had gone safely to Hamburg was claimed at the opening, but was properly abandoned by the concluding counsel. The difference between the prime cost and charges and the sales here, forms a fair measure of the damage sustained."

Warden v. Green, (6 Watts' R., 424,) was the case of part of the goods being landed at the port of delivery. Some were damaged and some missing. The value there was the rule adopted.

In *O'Conner v. Forster*, (10 Watts' R., 418,) there was a contract to convey wheat from Pittsburgh to Philadelphia, a proffer of the wheat by the shippers to the ship owners, and their refusal to receive and carry it. The damages were fixed at the difference between the market value of the goods at Philadelphia, at the time when they would have arrived, and their value at the place of intended shipment, with the freight.

Gillingham v. Dempsey, (12 Serg. & Rawle, 183,) is a leading authority. The subject was fully and ably examined. It is clear that the vessel had arrived at Philadelphia from Liverpool. The injury was sustained on the passage, and from improper stowage of the crates of earthenware. The value at Philadelphia was explicitly recognized.

Bridge v. Austin, (4 Mass., 115,) is carefully reviewed in the last cited case; and it does not afford much support to the proposition of the defendants in the case before us.

McGregor v. Kilgore, (6 Ohio R., 358,) was a plain case of neglect or misconduct of the carriers in not having efficient means of unloading and reshipping at the intermediate port. The right of doing so was given them in case of low water.

There are some other authorities which bear, though less directly, upon the present question.

It is entirely settled that when the goods, delivered to a carrier for transportation, are taken to the place of destination, but delivered in a damaged condition, or when some of the goods shipped are not delivered at all, but the vessel has arrived out, the value at the port of destination is the rule of estimating the damages. *Brandt v. Bowlby*, (2 Barn. & Adol., 932,) is a striking example of this rule.

So, if the vessel is driven by distress into an intermediate port, and part of the goods are there sold for the necessities of the ship, and she then arrives at her port of destination, the goods so sold are to be allowed for according to the price at the port of delivery, or the shipper has the right to elect to take the net proceeds of the sale. (*Alers v. Tobin*, cited *Abb. on Ship.*, 372; *Hallett v. Wigram*, 9 Com. Bench R., 580.)

But in *Atkinson v. Stephens*, (7 Exch. R., 567,) it was decided that when a portion of the goods had thus been sold at a port of distress, and the vessel had then proceeded, but never arrived at

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her port of destination, the owners were not responsible for the value of the goods at the latter port. The question arose upon pleadings, and the judgment was restricted to that identical point. It was stated to be an uncertain question, whether the ship owner was liable at all if the vessel never arrived at the port of destination. Leave to amend the declaration was given, with a view to have this point considered.

The Commercial Code of France (art. 298) provides for these cases. Freight is due for goods which the master has been obliged to sell to furnish repairs, &c., he being accountable for the value of the goods thus sold, at the price of the rest, or of similar goods of the same quality at the place of discharge, if the vessel arrive safe. If the vessel be lost, the master shall account for the goods at the rate at which he sold them, retaining the freight according to the bill of lading.

Justice STORY, in *Pope v. Nickerson*, (3 Story C. C. R., 465,) followed the rule of the Code, and held that a subsequent loss of the ship did not discharge the liability.

Mr. Abbott, (p. 372 and note n.,) has referred to the foreign authorities upon the point whether, in the case of a sale of some goods at an intermediate port, and then a loss of the ship and of the remaining goods, the goods sold were to be paid for at all. M. Boulay Paty has examined the subject with his usual care. (*Droit Commercial*, tome 2, p. 219.) The Judgments of Oleron, the Ordonnances of Wisbuy, and the Assurances of Anvers, are quoted with the opinions of Emerigon, of Valin and Pothier. The two latter authors were of opinion that the owners were responsible for the goods. He then states that the Commission (appointed by Napoleon to prepare the Code) adopted the contrary view of Emerigon, but the Council came to a different result; and he cites the reasoning of M. Begouen before the *Corps Legislatif*, which induced the adoption of the article as it appears in the Commercial Code.

The learned author concludes thus: "There cannot, then, at this day, be any further controversy. Whether the vessel arrive in safety, or is lost after the sale of the goods, the price of those goods sold for the necessities of the vessel must equally be paid, deducting the freight. Yet there is this difference: If the vessel arrive at her destination, the goods are to be paid for at the price

which the residue or others of the same quality are sold for at the place of discharge; but if the vessel is lost, the liability is only for the amount for which the goods were sold."

The argument upon which the exemption of the ship owner from any liability was based, was mainly this, that had the goods remained on board the shipper would have lost them. Of course a loss by such a peril as is excepted in the bill of lading, is contemplated.

The rule which has thus been adopted, after long and critical examination and discussion, by the second commercial power of Europe—the rule which the Courts of England have to this extent sanctioned—that goods sold at the intermediate port shall not be allowed for at their value at the port of discharge, when the vessel perishes, sheds no faint light upon the point we are now considering. We find (under the French rule at least) that while a responsibility is fixed upon the ship-owner for goods thus appropriated, although had they remained on board no liability would have been incurred, the value of the goods when and where lost to the owner, supplies the rule of damages. We find, also, a marked exception to the asserted universality of the rule, that the standard of compensation is the value at the place of destination.

There are other instances in which the value of goods, at the time of the injury or loss, or the prime cost, is taken as the measure of damages. Such is the rule in all marine torts. (*The Amiable Nancy*, 3 Wheat., 560, and cases.) Justice STORY says: "This rule may not secure a complete indemnity for all possible injuries, but it has certainty and general applicability to recommend it." A similar rule prevails in cases of insurance. In *Smith v. Condry*, (1 How. U. S. R., 28,) the Chief Justice says: "It has been repeatedly decided in cases of insurance, that the assured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of collision."

So, in general average, goods contribute according to their value at the place where they are considered saved. (2 Phil., 151; 5 Duer R., 429.

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These analogies are not indeed decisive. They are capable of being distinguished from the present case on various grounds; but at least they show how many exceptions exist to the rule assumed, and to open the inquiry whether, even in the case of common carriers, others may not be found consistent with justice and policy, and not repugnant to express authority or acknowledged principle.

Upon reviewing the decisions which have been cited, I do not find one in which the value at the port of destination has been taken, unless where either the carrier has been actually in fault or neglectful, or where the vessel, with the goods damaged or with the residue of the goods, had arrived at her outward port. I do find the case of *Wheelwright v. Beers*, which seems to sanction the rule of a valuation in New York, under the circumstances of the utter loss of the vessel and of the goods at that place before the ship had moved on her voyage. It is consistent with justice that the ship owners should respond for no more than the sum which would enable the shipper to replace goods of the same quality in the same condition on board another vessel. When the case is admitted or proven, of the entire exemption of the owners from any neglect or culpability, there does not seem to be any absolute mandate of policy which should increase their own loss or subject them to harder dealing than such a rule would prescribe. It may be observed that there is evidence of the defendants having a line of vessels engaged in running between New York and Liverpool. The witness had shipped goods by that line in the months preceding the shipment in question.

I think the charge of the Court below was right in this particular.

New trial denied, and judgment ordered for the plaintiffs for the amount of the verdict, with costs of suit.

ISAAC MERRITT, Plaintiff and Respondent, v. JOHN A. MILLARD, Defendant and Appellant.

1. A person who receives from one party to an illegal contract, money paid in execution and satisfaction of it to the use of the other party to such contract, on a promise to pay it over to such other party, cannot defend an action brought by the latter to recover such money, on the ground of such prior illegal contract, where the person receiving such money and making such promise in no way participated in or was a party to it, and did not know of it when he received such money and made such promise.
2. An answer which professes to set up a counterclaim, to be sufficient as a pleading, must state facts which constitute a cause of action in favor of the defendant against the plaintiff.
3. An answer which professes to set up new matter as a defense, and does not state facts which constitute one, may be demurred to for insufficiency, if pleaded after chapter 723, of the Laws of 1857, took effect. (Laws of 1857, vol. 2, p. 554, § 153.)

(Before BOSWORTH, Ch. J., and HOFFMAN and MONCRIEF, J. J.)

Heard, December 15th; decided, December 31st, 1859.

THIS is an appeal by the defendant, John A. Millard, from an order made June 27, 1859, by Mr. Justice HOFFMAN, overruling his demurrer to the complaint of the plaintiff, Isaac Merritt.

The complaint alleges, in substance, that on the 6th of September, 1851, one Jared Brewster owed the plaintiff \$500; and that so owing him, he paid to the defendant \$500, "to and for the use of the plaintiff," and the defendant in consideration thereof "undertook and promised to pay over the said sum of money to the plaintiff whenever he should be thereunto afterwards requested;" and a refusal by the defendant to pay this money to the plaintiff although subsequently requested; and prays judgment for the \$500, with interest.

The answer was put in on the 26th of March, 1858.

The defendant as a second defense, sets forth the transaction and agreement between Brewster and the plaintiff out of which the alleged indebtedness from the former to the latter arose; and he insists that such agreement is illegal and void, and one which the Court will not assist either party to enforce, and that he may avail himself of the illegality of that agreement, as a defense to this action.

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For a third defense "this defendant further answers and alleges that there is now still pending, in this Court, undetermined, an action for this same five hundred dollars, by this same plaintiff, against the same Jared Brewster, which this defendant insists and claims in bar of this action."

For a fourth defense "this defendant further says that the said plaintiff is justly indebted to him in the sum of about three hundred dollars for costs, as attorney and counsel for the said Brewster, in the action set forth in the third answer herein, which he claims by way of counterclaim in this action."

To these three defenses the plaintiff demurred severally; judgment was ordered in his favor, and from that order the defendant appealed to the General Term.

J. A. Millard, appellant, (in person.)

I. The agreement between Merritt and Brewster, it is admitted was illegal and void; and all the authorities show it to be so. I only cite here *Gray v. Hook*. (4 Comst., 449.)

The objection taken below, that a demurrer cannot be allowed for insufficiency since the Code of 1857, is still adhered to and repeated. (Code, § 153; 18 How. Pr. R., 79, 84.)

II. The complaint alleges that Brewster was indebted to plaintiff in the sum of \$500, which he paid over to defendant for plaintiff's use, and which defendant promised to pay to plaintiff. All this is denied by the answer, and then the answer sets forth, as a second defense, how Brewster was indebted, if at all, and all these allegations the demurrer admits to be true; and the Court decided that such contract was illegal and void.

But insisted that Brewster having executed his part of the contract, he is estopped from reclaiming the money from defendant, and the Court think there is no law by which the defendant can hold the money, and therefore the plaintiff may recover it.

Now it is insisted:

1. That the contract being void, the plaintiff has no foundation to stand upon. (*Thalimer v. Brinkerhoff*, 20 John, 397.) The plaintiff must and does found his action upon the contract with Brewster. How else could he claim the money? His action then proceeds upon the principle of affirmance of that

contract. But the Court say (*id.*, 398,) that "no case can be found where an action has been sustained which goes in affirmance of an illegal contract, and when *its object* is to enforce the performance of an agreement prohibited by law."

Also, see *Nellis v. Clark*, (20 Wend., 27,) which holds: "An individual should not be assisted by the law in enforcing a demand *originating* in a breach or violation, on his part, of its principles or enactments."

In *Vischer v. Yates*, (11 Johns., 29,) the Court hold the doctrine that the plaintiff cannot recover the money; for, say the Court: "that would be compelling the execution of an illegal contract as if it were legal, and would at once prostrate the law that declares such contracts illegal." (5 John., 334; 2 Caines R., 148.)

The plaintiff seeks to affirm a contract concededly only executed in part. But it is denied it is executed in part even. Upon the plaintiff's own theory the defendant is but the agent of Brewster, and the allegation that money was paid to defendant is denied.

Besides the contract now sought to be enforced grows directly out of the void contract and is inseparably connected with it. It is to enforce the completion of that illegal agreement. It cannot be tried without proving that contract. The plaintiff must seek aid from that contract, and how can this be without affirming it, which the law abhors. This case depends upon the validity of the agreement between plaintiff and Brewster, and if that be void it must fail. (20 Johns., 398; 7 Wend., 280.)

The Court will not assist to carry out this agreement more than it would the one which was made to effect the very object. (*De Groot v. Van Duzer*, 20 Wend., 400.)

2. The Court will not assist a party to enforce an illegal contract in any respect. (*Belding v. Pitkin*, 2 Caines R., 149; *Nellis v. Clark*, 20 Wend., 27; *Pratt v. Adams*, 7 Paige, 653; *Tylee v. Yates*, 3 Barb., 228.) The plaintiff must himself be free from imputation of fraud, he must come into Court with clean hands, or the Court leaves him as it finds him.

III. The defendant may make the objection that the agreement between Merritt and Brewster was void. He may set it up as a defense. (20 Wend., 390, 397, 400, 401; *id.*, 27, 37; 20 Johns., 397; 2 Caines R., 147.)

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Whenever and however, whether by complaint, answer, or evidence, the Court see the agreement is in any way connected with, or grows out of an illegal agreement, or is intended to aid or enforce such agreement, it will dismiss the matter and leave the parties as it finds them. *Farmer v. Russell*, (1 Bos. & Pul., 296,) holds that it is the duty of the Court to observe the transaction whenever it appears.

IV. The answer sets up that the plaintiff owes defendant and claims it as counterclaim. The demurrer admits it, and yet the Court say it can't see how that can be. The answer is, that the evidence would show how it could be if the Court will permit. (20 Wend., 401.)

A. K. Hadley, for respondent.

I. Whenever a party indebted to, or receiving money from, another, agrees to pay the amount thereof to a third party, such third party may maintain an action therefor in his own name. (Story on Contracts, § 376, X. Y. Z.; 17 Mass., 400, 575, 579; 2 Denio, 45; 4 id., 97, &c.)

If money be specifically committed for the purpose of such payment, the promise to pay will be implied. (19 Wend., 516; Story on Contracts, § 451, a; id., 460; *Weston v. Barker*, 12 J. R., 281; *Canfield v. Monger*, id., 346.)

It is an equitable assignment. (Story on Contracts, § 376, pp. 444, 437.)

This is an equitable action, and is to be prosecuted and defended on equitable principles.

II. It does not lie in the mouth of the defendant to say that the money was given him in pursuance of a legal contract. (*Tenant v. Elliott*, 1 Bos. & Pul., 3; *Farmer v. Russell*, id., 296; *Hastelow v. Jackson*, 8 Barn. & Cress. R., 221; *Yates v. Foot*, 12 J. R., 6; *Steers v. Lashby*, 6 Term. R., 61; *Brown v. Turner*, 7 id., 630.)

III. If a party voluntarily pay an unjust demand or under an illegal contract, he cannot recover it back. (Chitty on Contracts, 633-637; 11 Mass., 147, 368.)

IV. A demurrer is the proper and only proper mode of testing the sufficiency of the allegations in the second part of this answer. (Code, § 153.)

V. The third and fourth subdivisions of the answers are clearly frivolous.

BY THE COURT—BOSWORTH, Ch. J. The second defense admits (by not denying) that the defendant received the \$500 for the plaintiff, and promised to pay it to him when requested to do so; that he has been requested to pay it to the plaintiff, and refuses to pay it over, or any part of it.

Assuming the agreement between the plaintiff and Brewster to be one on which an action would not lie by the former against the latter to recover the \$500, yet it is not pretended that Brewster, after having paid the money to the plaintiff, could recover it back.

Can the defendant set up the illegal agreement between the plaintiff and Brewster, as a defense to this action?

Tenant v. Elliott, (1 Bos. & Pul., 3,) is an authority in support of the plaintiff's right to recover. *Farmer v. Russell*, (id., 296,) is not opposed to it. In the latter case, the defendant was a party to the transaction and to the carrying of the goods, for a part of the price of which (after it came to the defendant's hands) the plaintiff sought to recover. ROOKE, J., says he could not act on the monstrous doctrine, that the defendant's innocence shall work a loss to him, and his guilt shall be his indemnity. EYRE, Ch. J., and BULLER and HEATH, J. J., thought the plaintiff ought to recover, unless the original transaction could be mixed with the contract on which the action was brought.

In the present action, the second defense does not aver that the defendant had any knowledge or notice of the illegal agreement between the plaintiff and Brewster when he received the \$500 and promised to pay it to the plaintiff. It is sufficient to entitle the plaintiff to recover, to prove that the defendant received money for the plaintiff on a promise to pay it to him. His promise has its consideration in the receipt of the money, and in that only, and though it was a gift by Brewster, the defendant would be liable to pay it to the plaintiff.

In substance, the agreement as between the plaintiff and Brewster has been executed. Brewster has paid all he agreed to pay; not to the plaintiff personally, but to the defendant who received it for him and as his money, and on a promise to pay it to him.

In *Thalimer v. Brinkerhoff*, (20 J. R., 386, 398,) the Court said: "When it is considered that, in this case, the plaintiff's

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only title to demand anything depends on the validity of the agreement entered into between him and *Teller*, if that agreement be void, he stands without any pretense of right."

Brinkerhoff had not received any money as the plaintiff's agent, or to his use, or on a promise to pay it to him. He had received it under an authority from *Teller*, and for his use, and the plaintiff's right to any part of the money depended solely on the validity of the agreement between him and *Teller*.

In *De Groot v. Van Duzer*, (20 Wend., 390,) the action was brought, on an agreement held to be illegal, by one of the parties to it against the other.

In *Nellis v. Clark*, (20 Wend., 24,) the action was brought on a note given as part of, and by a party to, an illegal transaction, and the plaintiff stood upon the rights of the other party to such transaction.

There is, therefore, nothing in the facts of either of the three cases last cited which raises a conflict between the decisions made in them and that in *Tenant v. Elliott*. In the latter case it was decided that a person who receives from one party to an illegal contract, money paid in execution and satisfaction of it to the use of the other party to such contract, cannot defend an action brought by the latter to recover it from him on the ground of the prior illegal contract. *Owen v. Davis*, (1 Bailey R., 316,) is to the same effect.

In the present case, there is no connection between the defendant's promise and the illegal agreement between *Brewster* and the plaintiff. In that agreement the defendant in no way participated, and it is not alleged that he had any knowledge of it.

He has received money from *Brewster* as being the money of the plaintiff, and on a promise to pay it to the latter, and although it was paid to and received by him as the plaintiff's money; he insists upon retaining it. This is the whole transaction on which, as between him and the plaintiff, the rights of the latter and the liability of the former depend.

The cause of the delivery of the money to him by *Brewster* does not appear to have been disclosed at the time; with it he has no concern; it is his duty to perform his promise.

In *Armstrong v. Toler*, (11 Wheat., 258,) the Court held, that where the promise on which the action is brought, is entirely

disconnected with the illegal act, and is founded on a new consideration; it is not affected by such illegal act. The opinion of Chief Justice MARSHALL discusses the various prior decisions bearing on this question, and cites *Farmer v. Russell* (*supra*) with approbation.

A person who sells goods knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price if he yields no other aid to the illegal transaction than selling the goods, and obtaining permits for their delivery to the purchaser. (*Hodgson et al. v. Temple*, 5 Taunt., 181.)

If it do not offend the morals of the Court, in its administration of justice, nor violate any considerations of public policy to entertain such an action, it is not obvious why it should be reluctant to enforce the promise of a defendant who has received from a third person money to the use of the plaintiff upon an agreement to pay it to him, when that is the whole transaction to which the defendant is a party.

No case precisely like the present has been cited, in which it was held that the defendant could prevail on the grounds relied upon here.

By 1 Revised Statutes, 771, title III, and the act of May 15th, 1837, Laws of 1837, 486, usurious agreements are declared to be void, and the taking of usury is declared to be a misdemeanor, and is indictable as such. (Laws of 1837, 487, § 6.) In *Murray v. Judson and Sands*, (5 Seld., 78,) it was held that a general assignment, by an insolvent debtor, of his property to a trustee for the payment of his debts, is not void on account of its providing for the payment of a usurious judgment, giving it priority over other debts, if it be in other respects free from objection.

GARDINER, J., said, "the assignment was not a contract with the holder of the judgment, or a mere security for that debt, but the setting apart of property for the payment of a specified demand in the order designated. (*Id.*, 83.)

That remark suggests a clear distinction between the present case and *Dewitt v. Brisbane et al.* (16 N. Y. R., 508.) The latter case holds, that "the assignment, to secure the performance of an agreement void for illegality, of a mortgage valid between the parties to it, transfers no title, and is a defense to the mortgagor in an action brought against him by the assignee."

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In the case cited, the assignment was executed as a part of the illegal contract, and to secure to the assignee its performance by the assignor.

In the present case, the money sought to be recovered from the defendant was not paid to him as security for the performance by Brewster of his illegal contract with the plaintiff.

It was paid to him after all of that contract had been performed, except the payment by Brewster of the sum he had agreed to pay to the plaintiff. It was paid to and received by the defendant as the plaintiff's money, and on the defendant's promise to pay it to the plaintiff.

The defendant's promise to deliver the money to the plaintiff, and the delivery of it to him for the plaintiff's use on the defendant's promise to so pay it, is the whole of the transaction as between the defendant and Brewster.

When the plaintiff sues the defendant to recover the money on the refusal of the latter to pay it, the defendant should not be permitted, in such a case, to allege that Brewster was under no legal obligation to appropriate the money to the plaintiff's use; but on the contrary appropriated it as performance, on his part, of a contract between him and the plaintiff which was void for illegality.

It is enough to entitle the plaintiffs to recover, that the money when it came into the defendant's hands was the money of the plaintiff, and was received as such, and that there is no pretense that Brewster resists the payment or objects to the plaintiff's right to the money.

The plaintiff's cause of action against the defendant does not arise *ex turpi causa*; but is founded upon a transaction subsequent to and not mixed with the illegal agreement. It arises solely upon the defendant's acceptance of money as the property of the plaintiff and his promise to pay it to him; and upon the defendant's breach of that promise.

We think the demurrer to the second defense is well taken. We understood the defendant's counsel to concede, that the matter pleaded as a third defense did not constitute one. If it does not, the demurrer to it is well taken. (Laws of 1857, vol. 2, p. 554, § 153.)

In respect to the fourth defense, we think it quite clear, that a complaint, in an action by the defendant against the plaintiff, containing the same allegations, would be demurrable as not stating facts sufficient to constitute a cause of action.

No fact is stated, which justifies the inference that the plaintiff is liable to the attorney of Brewster for his services as such, in defending a pending action brought by the plaintiff against Brewster.

It is as essential to the sufficiency of an answer which attempts to set up a counterclaim or set-off, as to a complaint, that it state facts constituting a cause of action. The part of the answer, which states the fourth defense, does not do that.

The order or judgment appealed from must be affirmed.

Order affirmed.

CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS,
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.

ABRAHAM C. DAYTON v. GEORGE WILKES.

1. A. & W. being partners, A., with the consent of W., transferred all his interest to D.; D. and W. covenanting with A. to continue the same business, and to collect and apply the assets of the old firm, (except such as was necessary to pay current expenses,) to pay the debts of the old firm. The new firm becoming embarrassed, D. instituted a suit against W. to obtain a dissolution of his partnership, an accounting between them and a proper application and distribution of the assets: *Held*, that A. could not, upon petition, obtain an order that he be made a party to the action, and that the complaint be so amended as to bring him before the Court on pleadings presenting his alleged right to an equitable application of the property of the new firm, originally belonging to the old firm, to the end that his rights in such property might be determined, and the property distributed accordingly.
2. Such an action is not one for the recovery of personal property within the meaning of § 122 of the Code.
(At Special Term, October 28, 1859, before BOSWORTH, Ch. J.)

THIS suit is brought by Dayton against Wilkes to obtain a dissolution of a partnership between them, and accounting and a distribution of the assets of the firm.

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James B. Devoe, upon petition and notice, applies for an order that he be made a party to the suit, and that the complaint be so amended as to bring him before the Court, upon appropriate pleadings, to the end that his rights and interests in the property, which is the subject of the action, may be properly determined and protected, and for such other or further relief as may be just.

The petition states that Devoe and Wilkes were partners up to February, 1858, when Devoe transferred his entire interest to Dayton; that Dayton and Wilkes were to continue the business as partners, and have done so until this suit was brought, and that they agreed to collect the assets of the old firm and apply them, (except so much as was necessary to pay current expenses,) to pay the debts of the old firm. That there are debts owing by the old firm, and that it has assets not yet converted or realized, and that the new firm is insolvent.

The papers in opposition to the motion tended to show that Devoe had instituted a suit in the Supreme Court against Dayton and Wilkes, with a view to obtaining therein the relief to which he was entitled in the premises, and that he had moved for an injunction to stay proceedings in this action until a determination could be had in that. That such motion was denied and that such action is still pending.

BOSWORTH, Ch. J. Devoe and the creditors of the old firm have an equitable right to insist that the assets of the old firm be applied to pay its debts. (*Deveau v. Fowler*, 2 Paige, 400.) The agreement of Dayton and Wilkes to so apply them is in accordance with such equity.

Can Devoe compel the plaintiff in this suit to make him a party to it, to enable him to set up and obtain a judicial determination of the claim above stated?

The second sentence of section 122 does not confer on him that right, unless this be "an action for the recovery of real or personal property" within the meaning of that section. It is not an action to recover real property. Chapter 2, of title VII, of part II, of the Code, (p. 311, Voorhies' Code of 1857-8, § 253,) and sections 277, 289, subdivision 4, and section 304, subdivisions 2 and 4, show very clearly that an action "for the recovery of

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personal property" is something entirely different from a suit by one partner against another, to procure a dissolution of the firm and an administration of its assets.

Whether a complete determination of the controversy between Dayton and Wilkes cannot be had, without prejudice to the rights of Devoe, or by saving his rights, and without his presence as a party, is not to be determined on a motion like the present. That is a matter for the determination of the Court before which the cause may be tried, or brought to trial. The present motion, therefore, cannot be granted. But Devoe may have a stay of proceedings in this suit long enough to enable him to institute a suit, upon a complaint properly framed to present his claim. If the suit in the Supreme Court is adapted to this object, a discontinuance of it and commencing a new suit in this Court would seem to be a useless expense.

The institution of a suit in this Court, would make it necessary to discontinue the one in the Supreme Court.

I see no reason why the complaint in the suit in the Supreme Court, if not now in the proper form, may not be so amended as to enable the whole controversy to be determined by one action. But of this the petitioner must judge for himself.

The most relief that can be granted on the present motion, is an order staying proceedings in this action, except on the part of the receiver to collect and preserve the assets, for ten days, to enable Devoe to institute an action against Dayton and Wilkes and apply for such relief as he may be advised. He must pay \$7 costs of opposing this motion.

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1. When an action is tried before the Court without a jury, and the decision does not dispose of all the questions in controversy but directs a reference to state an account, no appeal regularly lies to the General Term from the order or decree until after such reference and final judgment thereon.
2. But when the trial of an action is begun all the issues should be tried and disposed of, so far as the reference ordered to take the account does not embrace them. There are not to be two trials, one before and one after the reference. Where a reference is ordered on a trial, in order to enable the Court to give judgment, the hearing which may be had on the coming in of the report of the Referee is not to be a trial, but a mere review of what has been done before the Referee, and its confirmation or the contrary, and the application of the decisions already made on the trial to the account stated.
3. If the trial begun before the Court is terminated without deciding all the questions which ought to be determined before the reference is directed, and is left so unfinished that it should properly be deemed a mistrial, then an order made on such a trial, ordering a reference and appointing a Receiver, may be appealed from. Such a case is not within section 268 of the Code, forbidding the review of what is done on a trial before a Judge, except by appeal from the judgment.
4. And where an appeal to the General Term was taken from an order made on a trial without a jury, appointing a Receiver and directing a reference to state an account between the parties, and such appeal was argued and decided upon the merits, all of the proceedings on the trial being reviewed and considered and a new trial ordered, the Court refused to vacate the order granting a new trial and so reinstate the order of reference and appointment of a Receiver, which they have decided to be erroneously made.
5. The proceedings on the appeal to the General Term in the case, as last stated, were not without jurisdiction, in such sense that the order of the General Term was void; nor will those proceedings embarrass the plaintiff in prosecuting his case on the new trial and subsequent proceedings to final judgment.

(Before all the Justices.)

Heard, November 12th; decided, November 26th, 1859.

MOTION by the plaintiff to vacate an order for a new trial, made at a previous General Term. The action was brought by a judgment creditor of one member of an alleged co-partnership, in carrying on a hotel, to set aside an assignment and for an account of the debtor's interest in the business. It was tried at Special Term before a Judge without a jury, and after the cause had been submitted for decision the Judge determined

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some of the questions in controversy; the fact of co-partnership, the terms thereof, and the liability to account, and right to distribution, and directed a reference to state an account between the parties. And he also directed the Referee (in case certain security was not given by the defendant) to appoint a Receiver who should take possession of the property of the co-partnership, carry on the business of the hotel until a sale could be made, sell the property, and collect the debts and hold all proceeds to be disposed of and appropriated according to the rights of the parties as they may be finally settled; and, reserving the question at what day the partnership is to be deemed to have terminated, the Referee was to so state the account that on the determination of the precise day the account would furnish the materials for directing a distribution or appropriation of the property as might be just, which soever of the disputed days might be determined thereafter by the Court as the day of the dissolution.

From the order (in the nature of an interlocutory decree under our former Chancery system,) an appeal was taken to the General Term. On that appeal the general merits of the cause were considered and the principles of the decision and the exceptions taken on the trial, and a new trial was ordered.

A more full statement of the nature of the controversy, the issues between the parties, the order made at the trial and the decision of the General Term, are contained in the report thereof. (1 Bosw., at page 281, *et seq.*)

From the order granting a new trial the plaintiff appealed to the Court of Appeals, giving the stipulation required by the act of 1857. (Laws of 1857, chap. 723; § 11 of Code, subd. 2.)

That Court dismissed the appeal upon the ground that until a complete and final disposition of all questions, whether of liability or its amount, capable of being litigated in the cause, no appeal would lie to that Court; and that the act of 1857, allowing an appeal from an order granting a new trial, would only apply to cases in which judgment absolute could be directed, finally disposing of all such questions. And in the memorandum of the views of the Court, said to exhibit the grounds of dismissal, it was intimated that the appeal to the General Term of this Court was premature, and that the order granting a new trial might perhaps be vacated by this Court.

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Thereupon the plaintiff moved this Court in General Term to vacate the order reversing the decision at Special Term and directing a new trial, which was entered on the decision reported in 1st Bosworth. That report and the opinion given on this motion give all the facts which it is material to state.

David Dudley Field, for the plaintiff, in support of the motion argued:

1st. That the General Term, before which the appeal was argued and by which the order of reversal and for a new trial was made, had no jurisdiction to hear or determine the appeal.

2d. That there was no power to stop a trial which was in progress before a single Judge; that in this case the trial was unfinished; that the plaintiff was entitled to go on and finish the trial, and have the questions which had been left undecided, determined. The decisions which the Judge had made at Special Term to stand, and to govern the reference which should now proceed upon the principles directed at Special Term, just as if no appeal had been taken to the General Term, and that a Receiver should be appointed as directed.

3d. That the order of the General Term having been made without jurisdiction should nevertheless be vacated as an incumbrance to the record, and possibly embarrassing the orderly conduct of the cause in the future.

H. F. Clark, for the defendants in opposition, insisted:

1st. That the General Term had jurisdiction to hear the appeal which they did hear and determine; that so far as the order appealed from appointed a Receiver, it was appealable by the express terms of the Code as an order granting a provisional remedy. (Code, § 249.)

2d. That on the merits the order for a Receiver should have been reversed as it was.

3d. That the plaintiff did not raise the objection that the appeal was not properly taken when the said appeal was heard, and he is therefore concluded. He is now too late, after a reversal of the order appealed from, to ask that the reversal be vacated on any such ground. He should have moved before the hearing to dismiss the appeal.

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BY THE COURT—WOODRUFF, J. The Court of Appeals have decided that no appeal will lie to that Court from the order or decree made herein, until the reference thereby directed shall have been had and a final judgment entered: that such decree, or order, is not a final judgment within the meaning of that term, as used in the Code.

The insuperable obstacle to a hearing of an appeal in the present stage of the action is, that that Court has no jurisdiction to entertain the appeal.

This Court, in General Term, have decided, in a similar case, (*Laurence v. The Farmers' Loan and Trust Co.*, 6 Duer, 689; 15 How. Pr. R., 57,) on a motion to dismiss an appeal, that a decision made on a trial by the Court without a jury can only be reviewed on an appeal from the judgment, and that, where the decision and order direct a reference to take an account, that appeal cannot be taken until the account has been taken and all questions arising upon it have been disposed of at Special Term; and that an appeal, such as was heretofore taken in this cause from the order or decree in question, will be dismissed on motion; and that the term "judgment," from which an appeal may be taken to the General Term, means the same thing as a judgment from which an appeal can be taken to the Court of Appeals.

In the present case, the order or decree appealed from directed the Referee, (in the event that certain security was not given by the defendant,) to appoint a Receiver, who should take possession of all the property alleged to belong to the partnership to which the controversy relates, and should carry on the business of the hotel in question until a sale could be made; should sell the property and collect the debts, &c., and hold the proceeds (as Receiver) to be disposed of according to the rights and interests of the parties as they may be finally settled.

If the proceedings had at Special Term are not so defective that they must be deemed a mistrial, then, unless the circumstance that provision was thus made for the appointment of a Receiver creates a material distinction from the case decided in this Court, it is to be deemed now settled, not only that the Court of Appeals have no jurisdiction to entertain an appeal in the present stage of this cause, but that this Court would have been bound to dis-

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miss the appeal which was taken herein to the General Term, had the respondent moved for such dismissal.

The present motion, therefore, seems to us to raise two questions only which are open to discussion :

First, Do the conduct of the cause on the trial, the unfinished state in which the trial was left, and the appointment of a Receiver in the order, so distinguish this case from *Lawrence v. The Farmers' Loan and Trust Company* as to make the order appealable? and,

Second, Was the General Term of this Court without jurisdiction to hear and determine the appeal, in that sense that their determination was either void or so erroneous that it will render the future proceedings in the cause also erroneous?

1. In relation to the first question, it should be stated that the order or decree in question does not purport to determine all of the matters in issue.

A question, upon which the result of the litigation may depend, is reserved until the coming in of the report of the Referee, viz., whether the partnership between the defendants terminated on the 5th of December, 1854, or continued down to the present time. Upon the decision of that question may depend the question whether there is any property belonging to the defendant Judson, or any interest in the co-partnership property which the plaintiff, his creditor, can reach. For, if the co-partnership be then deemed dissolved, the whole property may be necessary for the payment of the co-partnership debts.

The case, then, is one in which, a trial having been begun, the Court determine a part only of the issues, and, not deciding one without which the rights of the parties cannot be determined, order the cause to a reference and appoint a Receiver. It is not a cause in which every question on which the rights of the parties depend is decided, and the application of the decision to the state of the accounts by mere computation only remains to be done.

In a suit brought for an accounting, a trial may be had, and, on determining all the questions material to the issues, an accounting may be directed as the very relief prayed for, and such accounting may be directed to be had after the trial and before a Referee.

And when it is necessary that an account be taken for the information of the Court, no doubt that may be directed to be taken before the trial of the cause in a case proper for the submission of the other questions to the Court or to the jury. But we apprehend that, whenever the trial is begun, whether it be the trial of the issues before the account is taken, or the trial of the remaining questions after the account is taken, it must be finished; and that part of the issues cannot be tried before the account is taken, and the residue afterwards at a subsequent term.

Where a trial is had before an accounting is directed, it should determine all the issues. Such questions as arise on taking the account are, of course, to be disposed of by the Referee; but we do not think that there can regularly be two trials of the same cause—one before and one after the accounting is had. A hearing on the report of the Referee, if any hearing is necessary in such case, is not a trial; it is a mere review of what has been done on the reference and the confirmation or setting aside of the report, or the application of the decisions made on the trial to the account stated.

The question, then, recurs: Is an order or decree, made on an unfinished trial, deciding some of the issues and appointing a Receiver, appealable?

We are not prepared to hold that every order which a Judge may make in a cause after he has begun a trial thereof, which he does not finish, is an order that cannot be reviewed on appeal, although it purports to be founded on the facts proved before him.

If, in fact, though the trial is begun, it is not completed, but is, in truth, a mistrial, it seems to us that the orders made and entered by the Judge may be appealed from as interlocutory orders. That there should be some mode of setting aside, or of reversing, such orders, cannot be doubted.

If we hold that section 268 is applicable to such orders, and that they can only be reviewed on appeal from the judgment, then no motion to set them aside could be entertained; and, if not appealable, they must stand as valid orders in the action until a future trial shall be had and a final judgment rendered.

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This is not the meaning or effect of the section referred to. That has no application to a mistrial or the orders made thereon.

If this be correct, and the view above suggested of the trial herein be just, then the order herein was appealable, and we ought not to disturb the order of reversal and order granting a new trial, merely because it was made upon a review of the merits and not on the grounds above stated.

Indeed, it seems to us that one of three views must be taken of the present condition of the cause.

Either the proceedings had at Special Term must be treated as of no effect, because the trial, though begun, was not finished and the term was ended;

Or, the orders there made should be set aside on motion, for the same reason;

Or, those orders were properly appealable, because made on what has practically proved to be no trial.

We regard the latter as the most suitable and orderly mode of avoiding such orders, and that nothing in section 268 forbids it. They are not made under the circumstances contemplated by that section.

But, without resting the determination of the present motion on this ground alone, we inquire,

2. Assuming that the proceedings at Special Term are to be regarded as a trial of the action, (although unfinished,) was the General Term without jurisdiction to hear and determine the appeal, in such sense that their determination was either void or so erroneous that it will render the future proceedings in the cause also erroneous?

The remaining question is thus stated, because, if the proceedings heretofore had upon the appeal are wholly void, they ought not to incumber the record and present a palpable incongruity and conflict between the orders of the Court and the subsequent proceedings which, in that view, may properly be taken in disregard thereof. And if, though not wholly void, the proceedings are so erroneous as to render the subsequent proceedings in the cause, had in conformity with the directions of the General Term, also erroneous, then the error ought to be corrected at once, to save expense and delay in the prosecution of further and future appeals to correct the error.

But, on the other hand, if, when the respondent did not move to dismiss the appeal, but suffered the same to proceed to a hearing and determination, the question is one of regularity merely, and the decision of the General Term is operative and binding on the parties, and will not render such subsequent proceedings erroneous, then, although the General Term would have dismissed the appeal had a motion to dismiss been made, we ought not now to set aside the proceedings, for two reasons: *First*, Because, viewed as a mere irregularity, it is cured by the appearance of both parties to argue and the actual argument of the merits; and, *Second*, Because, on the merits, the General Term have decided that the order appealed from was erroneously made, and, therefore, to now vacate the reversal and send the parties to a reference in the face of that decision, under which the whole must hereafter be reversed, (when the reference has been had,) is apparently subjecting the parties to great expense, trouble and delay for no useful purpose; and, in respect to the Receivership, it would break up the defendants' business by force of a decision decided by the General Term to be wrong.

It is true that a General Term of this Court may, on the coming up of a future appeal, be so constituted that the opinions of the General Term already announced herein will not be followed; but we do not think our action here should recognize such a possibility. We should regard the decision which was in fact made; and if so, the setting aside of the order of reversal can be of no advantage to either party, but quite the contrary, and we are satisfied that, if the plaintiff proceeds to the new trial which has been ordered, his proceeding will be, in all respects, safe, and cannot be assailed by the defendants. The motion should be denied; the costs of the motion, (under the peculiar circumstances in which the motion was made,) to be costs in the cause, and abide the event.

Ordered accordingly.

Bosw.—Vol. V.

Gray *et al.* v. Kendall *et al.*

JOHN A. C. GRAY *et al.*, Plaintiffs and Appellants, v. ISAAC KENDALL *et al.*, Defendants and Respondents.

1. Where an action is brought by several creditors of a limited partnership, as plaintiffs, against the members of such partnership and their general assignee, under an assignment made for the benefit of creditors, to remove such assignee, procure the appointment of a Receiver, and compel a distribution of the assets, and the complaint merely states that one of such plaintiffs is a creditor in a sum specified, "on several promissory notes of said firm made before the execution of said assignment," and that another plaintiff is "a creditor in the sum of \$1,900 and upwards," the complaint will be ordered to be made more definite and certain, so as to state the several causes of action as particularly as is requisite in an action to recover a judgment *in personam* for the same causes of action.
2. Where several persons not united in interest join as plaintiffs in an action, the complaint to be verified as the Code requires, must be verified by the oaths of the plaintiffs severally, who are not united in interest.

Before BOSWORTH, Ch. J., and WOODRUFF and MONCHIEF, J. J.)

Heard, December 10; decided, December 17, 1859.

THIS is an appeal by the plaintiffs from an order requiring their complaint to be made more definite and certain, and as amended to be verified by the plaintiffs severally who are not united in interest. This action is brought by three several creditors (hereinafter named) of the late limited partnership of "Ely, Bowen & McConnell," and is brought on behalf of the plaintiffs and all other creditors of that partnership who shall come in and contribute to the expenses of this action.

It is brought against all of the members of said limited partnership, and also against Isaac Kendall, to whom said partners have assigned all the partnership property in trust for the benefit of the creditors of the partnership, without preferences.

The action is brought to remove the assignee and obtain from him an account as such, and to procure the appointment of a Receiver to convert and distribute the property of the partnership among its creditors.

The complaint states that the plaintiff, John A. C. Gray, is a creditor of said partnership "for the sum of \$50,000 and upwards,

on several promissory notes of said firm, made before the execution of said assignment.

"That the plaintiffs, William C. Haggerty and Ogden Haggerty, are creditors of said Ely, Bowen & McConnell, in the sum of \$1,900 and upwards.

"That the plaintiff, David Wagstaff, is a creditor of said Ely, Bowen & McConnell, in the sum of \$9,000 and upwards, on several promissory notes of said Ely, Bowen and McConnell, made before the execution of said assignment."

The complaint is verified by the affidavit of John A. C. Gray alone.

On the 11th of November, 1859, an order was made by Mr. Justice SLOSSON, requiring the complaint to be made more definite and certain in its statements of the nature and particulars of the alleged indebtedness of the limited partnership to the several plaintiffs, and that it be amended so as to state when and for what such indebtedness was contracted, and the dates and particulars of any notes given on account thereof, or that copies of such notes be set forth, and providing that the complaint, when so amended, be verified by each class of plaintiffs, or if that be not done, that the defendants be at liberty to serve an unverified answer. From that order the present appeal is taken.

H. Smales, for appellants.

I. The fact that the plaintiffs are creditors of the assignors is the only material fact; the precise amount of the debts and the particulars required by the order are wholly immaterial.

1. The amendment would render it necessary to set forth over sixty promissory notes, besides other matters, making the complaint double its present length, while the production of a single note (held by each creditor) on the trial, or proof of any portion of his debt, would be sufficient to sustain this part of the plaintiffs' case.

2. The amendment would tender a large number of immaterial issues, and burden the defendants with the necessity of taking issue on them.

3. If all the particulars required by the order had been inserted in the complaint, the Court, on defendants' motion, would have stricken them out as redundant.

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4. The question is, not the amount of indebtedness, or its nature, but the simple fact whether or not the plaintiffs are creditors.

5. The statements as to Gray and Wagstaff (at least) are sufficient. They are stated to be creditors on "several promissory notes of the assignors made before the assignment."

6. If the particulars are required to enable the defendants to go to trial, they could be obtained by a bill of particulars, without burdening the record with useless averments.

II. It is sufficient for one of several parties, "united in interest and pleading together," to verify a complaint.

There are several decisions that, where defendants have separate and unconnected defenses, as in case of action against maker and indorsers of a note, &c., each must verify the answer; but no case has been decided requiring a complaint to be verified by more than one of the plaintiffs.

1. The object of verification of a complaint is to insure its general truthfulness and *bona fides*, not the absolute verity of each fact alleged.

It may be made by an agent wholly on information and belief, or by the attorney, in case of absence of the party from the county in which the former resides.

2. The plaintiffs are "united in interest" in the subject matter of the action; therefore, by the Code, the verification by one is sufficient.

3. The order, in this respect, is wholly unsupported by authority, and contrary to the practice from the first passage of the Code.

4. The mode of verification is directed by the statute, and cannot be varied by order of a Judge. In this case, should either of the plaintiffs, Gray or Wagstaff, be absent, a verification by all the other plaintiffs would not be within the Judge's order, and might be disregarded. The order appealed from should be vacated.

Geo. W. Parsons, for respondents.

I. Where defects in a complaint are not of such a substantial nature as to be available under the ground of demurrer, that it does not state facts sufficient to constitute a cause of action, the

remedy is by motion, under section 160, to strike out or make the faulty pleading more definite and certain.

Such proceeding has taken the place of demurrer for want of form. (*Prindle v. Caruthers*, 15 N. Y. R., 425.)

1. It is claimed that the Code requires not merely true propositions to be stated, but physical facts, capable as such of being established by evidence, oral or documentary, and leave it for the Court to draw the conclusion of law. (*Lawrence v. Wright*, 2 Duer, 674, [Duer, J.]; *Corey v. Mann*, 14 How. Pr. R., 164; *White v. Brown*, id., 284; Code, § 142, subd., 2.)

2. Also, that every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly stated. (*Allen v. Patterson*, 3 Seld., 478; *Eno v. Woodworth*, 4 Comst., 249; *Page v. Boyd*, 11 How. Pr. R., 415; *Howard v. Tiffany*, 3 Sand., 695; *Adams v. Holley*, 12 How. Pr. R., 326; *Thomas v. Desmond*, id., 321.)

II. Judged of by the above rules, the complaint is clearly defective in not stating all the facts which constitute the several causes of action, which enable the plaintiffs to maintain such an action against defendants.

1. It is not disputed that it is necessary that plaintiffs should severally be creditors to have a standing in Court in such an action.

2. How, then, can they escape the necessity of making proper averments of facts which will enable the Court to conclude, as matter of law, that they are creditors? Must they not, if disputed, prove facts which show them to be creditors? If so, then the rule established by the Court of Appeals, in the case of *Allen v. Patterson*, (3 Seld., 478,) applies. This says: "Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated."

3. If this be true as to one of the claims, it must be true as to all of them, and it is not sufficient, as plaintiffs seemed to suppose on the argument at Special Term, to show one valid claim belonging to each plaintiff constituting him a creditor.

(a.) It is admitted that the ownership of any valid claim over \$100 by the plaintiffs severally, would entitle them to bring this

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action, but having made claim to be creditors in certain specified amounts, they are bound to state facts which show them to be creditors in the amount stated.

4. The question whether they are creditors or not, is one upon which the defendants have a right to take issue; and it is impossible for them to do this without the averments required to be made by the order of the Special Term.

III. It was necessary that the complaint should be verified by or on behalf of each class of plaintiffs.

1. The plaintiff who did verify the complaint, could not possibly know that the allegations in the complaint, touching the claims and rights of his co-plaintiffs, were true, and we have a right to purge the conscience of each plaintiff or class of plaintiffs.

2. If their complaint is to be treated as a verified complaint, the oaths of the plaintiffs, several in interest, should be upon the record.

3. It has been repeatedly held that when different parties to a promissory note are sued together, under the statute, even if the parties have a common defense and join in their answer, the pleading must be verified by all the parties. (*Hull v. Ball*, 14 How. Pr. R., 305; *Andrews v. Storms*, 5 Sand., 609; *Youngs v. Seely*, 12 How. Pr. R., 395.)

The remedy by motion was the proper one, and the order of the Special Term should be affirmed, with costs.

BY THE COURT—BOSWORTH, Ch. J. This action cannot be maintained unless the plaintiffs were, or unless some one of them was a creditor of the limited partnership of Ely, Bowen & McConnell at the time the action was commenced.

The allegations employed to show that they were such creditors, should be sufficiently definite and specific to inform the defendants when, in what manner, and by what contracts of said firm, it is claimed that they became indebted to the plaintiffs severally, and in what amount.

It is as important in a suit like the present, as in one brought to recover a judgment *in personam*, that these particulars should be stated in order that the defendants may set up by answer that said alleged demands have been paid or settled; or if no such demands ever existed, that issues may be formed by the plead-

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ings, which will show what claims must be proved to establish the fact that the plaintiffs were severally creditors when this action was commenced.

This will not subject the plaintiffs to any inconvenience which is not common to all plaintiffs who institute an action and claim relief on the ground that the defendants, or some of them, are their debtors.

To allow the plaintiffs, in the present case, to state less than this in their complaint, will expose the defendants to the hazard of having notes made by them, produced and offered in evidence at the trial, which the plaintiffs do not now own, or to which there may be a good defense, without its being in their power to establish these facts, and that solely because the complaint does not enable them to know what are the notes or causes of action which the plaintiffs intend to prove, to show that they are such creditors as the complaint alleges.

We know of no rule of pleading, nor of any precedent, which sanctions a complaint like the present, in respect to that portion of it to which the order appealed from relates.

In respect to so much of the order as relates to the verification of the amended complaint, it is sufficient to say that the same rule applies to that as to an answer.

When any pleading is verified, "it must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by at least one of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit." (Code, §§ 156, 157, [133, 134].)

It is provided by statute that whenever in any statute any "party or person is described or referred to by words importing the singular number," several persons shall be deemed to be included. (2 R. S., 1st ed., 778, § 11.)

When the Code requires the verification to be made by the affidavit of the party, it requires the affidavit to be made by every party who unites in such pleading, whose interest is several. If this be not done, the adverse party should not be required to treat it as a pleading verified as the Code requires.

This rule has been applied to answers in which several persons not united in interest have joined. There is no reason why



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it should not be applied to a complaint in an action commenced by several persons as plaintiffs, who are not united in interest. At all events, the Code does not discriminate between them, but on the contrary applies the same rule to both.

The order should be so modified as not to require any of the plaintiffs, whose demands consist, in whole or in part, of promissory notes made by the limited partnership, to do more in respect thereto than to describe such notes accurately or to set forth copies of them. In other respects it should be affirmed.

Order affirmed.

CATHERINE N. FORREST v. EDWIN FORREST.

1. In an action in which a divorce has been granted and a reference had to settle the amount of alimony, on which reference the testimony is very voluminous and the amount, reported to be just, large, and the defendant's counsel alleging errors committed by the Referee, and being in doubt whether, under a system of practice recently introduced, it is necessary, in order to review the proceeding, to make a case and move thereon to set aside the report and for a new trial or further hearing before the Referee, or whether he can move on the report and testimony and his exceptions, the Court will extend the time and stay the plaintiff's proceedings to enable the counsel to determine his course, and prepare his papers.
2. It seems in such case that the review of the proceedings on such a reference is by a hearing of the exceptions on the testimony, report and minute of proceedings annexed thereto, and that no formal case is necessary. (Rule of Court, No. 32.)
3. Although in the progress of an action for a divorce alimony *pendente lite* has been once fixed and allowed to the plaintiff, the amount may be altered and increased upon its appearing that the necessities of the plaintiff require it, and the amount of the defendant's property is such that the increased allowance is reasonable.
4. The amount reported to be reasonable by the Referee, appointed to settle the amount of permanent alimony, is not to be taken as the rule in determining the alimony to be allowed pending the further litigation, and while that report is itself in course of being reviewed on exceptions.
5. In determining the allowance of alimony, the amount of the principal of the defendant's estate being stated by himself, it is just to assume that he

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makes that principal yield a reasonable income unless he shows some sufficient reason why he does not and cannot.

(Before Woodruff, J., at Special Term.)

Heard, December; decided, December 31st, 1859.

IN this action a decree for divorce having been granted, a reference was ordered to inquire what alimony should be allowed to the plaintiff. (6 Duer, 102-151.) Pending the reference and in July, 1859, an order was made allowing temporary alimony at the rate of \$200 per month, and that the defendant advance to her \$1,500 towards counsel fees and the expenses of the reference. (3 Bosw., 650-656.)

The reference proceeded; and the amount reported to be just and reasonable by the Referee was \$4,000 per annum, and required the payment of a large sum for arrears.

Numerous exceptions were taken by the defendant to the rulings of the Referee on the hearing before him and also to his final decision; and the matter being about to undergo further examination before the Court at Special Term on the report of the Referee, the defendant's counsel suggested a doubt whether under the present practice it was necessary, in order to review the proceedings before the Referee, that he should make a case as upon a motion for a new trial, or whether, on the other hand, a hearing could be had on the exceptions, and the Referee's report, to which is annexed the testimony taken and a minute of all the proceedings had before him; and upon such suggestion, and showing that the testimony was voluminous, the defendant moved for twenty days' additional time within which to prepare a case or exceptions (if a formal case or anything in the nature of a bill of exceptions should be deemed necessary) and for a stay of proceedings.

A cross-motion was at the same time made on behalf of the plaintiff for an increase of the allowance for alimony pending the further controversy, on showing that the provision heretofore made was insufficient and claiming that the full amount reported by the Referee should be allowed to her, and asking also further provision for expenses and counsel fees.

The facts material to be noticed are stated in the opinion of the Court. Both motions were argued and decided together.

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John Van Buren, for defendant.

Chas. O'Conor, for plaintiff.

WOODRUFF, J. The time which I have taken for the consideration of these motions was not so much required by any questions of doubt or difficulty appearing after examination of the papers submitted, as by the number and voluminous character of the papers upon which the motions were respectively made and opposed. Laying out of view the notoriety which has been given to the litigation, the freedom and extent to which in its various stages it has been the subject of comment, and the bitterness of feeling which has characterized many of the papers presented by the parties from time to time, the questions now raised are not extraordinary, and do not involve points of novelty or difficulty.

1. The defendant desires to review the proceedings had on a reference involving a question of large pecuniary importance. The result of that reference, if the report of the Referee be confirmed, will require him to pay to the plaintiff a present sum of about \$36,000, and in the future an annuity of \$4,000. His counsel declares, under the sanction of his oath, his belief that errors have been committed on the reference, to the prejudice of the defendant, which should be the subject of review on a proper presentation to the Court of all the proceedings had before the Referee before the report is confirmed.

The papers which must necessarily be prepared for that review are voluminous, and the counsel expresses some doubt as to the precise form in which that review is to be had.

Additional time is therefore asked to enable the counsel to prepare the case, (if a case be necessary,) in order that the defendant's right of review be fully preserved to him.

I deem the application in all respects reasonable, and the indulgence sought should be granted. It is the constant practice of the Court to grant a similar indulgence in cases of far less importance, and often when the necessity for further time is far less, and the grounds of the application of slighter force.

As suggested by me on the argument, I am of the opinion that this report may be reviewed, and must be reviewed, in conformity

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to the 32d of the Rules of Court, on exception, and that no other "case" is necessary than copies of the report of the Referee and the testimony taken by him, and proceedings had before him, as detailed in the papers annexed to such report, and a copy also of the defendant's exceptions. But I do not deem it my duty, on this motion, to decide that question, either to relieve the counsel from the responsibility of taking such course as they may deem regular, or to endanger the defendant's rights, by deciding in advance a question not necessarily involved in the motion before me, especially since, if I should, by such decision, deprive the defendant of the means of a full review of the decisions by which he alleges he has been aggrieved, it might perhaps be impossible at a future day to repair the mischief if I should fall into any error by acting on the opinion above expressed. If he should prepare a case, and it should be deemed irregular and be set aside on motion, he will have lost no rights; while, if I deny him time, he may be remediless.

I may, no doubt, safely assume that the defendant's attorney has been reasonably active and industrious since the Referee's report was filed, and, if so, has had already twenty days since the report was filed for the preparation of his papers therein. An additional twenty days will, no doubt, be sufficient within which to determine whether a formal case is necessary, and to prepare it, or complete its preparation. And the order will give him twenty days from the 2d of January, and provide that the plaintiff's proceedings be stayed, unless the Court at Special Term shall sooner decide to hear the cause under the 32d Rule, or in conformity to the order by which the reference was directed, without any case being made other than a copy of the report and accompanying proofs, &c., and the defendant's exceptions; in which event the stay of proceedings shall cease, so as to permit the cause to be heard on the report and the exceptions thereto. If the stay of proceedings be not so terminated, it shall continue until the case, if duly made and served, shall be settled.

2. In relation to the plaintiff's motion for a greater allowance by way of alimony, I do not deem it proper, on the mere ground that the Referee has determined, on the evidence before him, that \$4,000 a year is a reasonable and proper sum for permanent alimony, to adopt that report before it has been confirmed and

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while it is claimed by the defendant, under the advice of his counsel, to be liable to exception for grave errors, and require the defendant to pay that amount, while the report itself is undergoing the review which the defendant is entitled to.

Until final judgment, any order for alimony should, I think, be governed by the rules usually regulating the temporary provision which is clearly and palpably just, whatever may be the sum finally awarded. Were I now to adopt the finding and report of the Referee, I might, with propriety, be said to have confirmed it *pro hac vice*, in advance of the action of the Court upon it, and without a hearing of the defendant upon his objections to the report.

On the other hand, it is quite clear to my mind that—it being finally settled in this Court that the plaintiff is entitled to her judgment of divorce and to alimony on the ground that her husband is guilty and that she is innocent—if I could certainly know, at this time, what sum would be finally awarded, it would be my duty to allow her that sum, else a premium would be offered to the defendant as an inducement to delay the final order to the utmost of his power. But it is impossible that I can be so assuredly informed.

It is, however, equally clear that, though I can have no such certain knowledge, I am bound, if the pecuniary circumstances of the defendant are such as to warrant it, to see that the plaintiff is reasonably and comfortably provided for until the permanent provision for her shall take effect. And that this is not unjust to the defendant is too plain to require discussion; for, if he were wholly innocent of the charges made against him by the plaintiff, he is bound to make that provision, and his having been found guilty by the verdict of an impartial jury, on a full and fair trial, cannot render the obligation any less.

Upon consideration of the affidavits on the part of the plaintiff, and taking the defendant's own testimony before the Referee as a guide to the amount of his estate, I cannot avoid the conclusion that the provision now made for the plaintiff is inadequate. The aggregate of his estate he first states to be \$260,000. He afterwards states that the aggregate is \$176,800; and his explanation of the difference shows that he has, since this suit was brought, given large amounts of property to his sisters, or purchased and

paid for large amounts of property which he has caused to be conveyed to them. Now, without assuming that the defendant is earning anything by his own personal exertions, and requiring only that he obtain a reasonable income from the property he has accumulated, and even recognizing the gifts to his sisters, (which, so far as the plaintiff is to be affected thereby, ought not to be taken as a diminution of his means to her prejudice,) it is plain that she is now entitled to receive, even as temporary alimony, at least \$3,000 a year; and he is entirely able to pay it. I am not considering the question of permanent alimony, upon the whole evidence before the Referee; and, in naming \$3,000, I am not intimating any opinion on the question whether the report of the Referee is right or not. But, conceding that temporary alimony ought to be fixed at a sum clearly within the limit allowable in fixing permanent alimony, the sum of \$3,000 a year is moderate, with reference to his means and her necessities.

The plaintiff, by her motion, asks for a further sum for expenses and counsel fees. But she has not shown that the moneys provided for such expenses and fees by the order of July last have been expended. Fifteen hundred dollars were directed to be paid, and were, it may be presumed, paid by the defendant.

The plaintiff states that, for expenses of the reference, other than counsel fees, she has paid out upwards of \$500. It is true that the Court might presume that she has also paid the balance, or a great portion thereof, to counsel, if they have been fully paid for the conduct of the reference, the proceedings upon which have been produced on this motion. But it is not so stated; and I prefer not to indulge in conjecture on a subject when the truth might so easily have been shown. If she has \$1,000, or thereabouts, unexpended, she has no present need of more, unless, nor until, she has been required to pay it. And, if she has paid it to her counsel, she can easily state it. It will be time enough to make an order when she shows its necessity more distinctly; and for money for expenses of the litigation, she can apply at any time.

The direction as to the alimony will be, that it be paid in monthly sums of \$250, instead of \$200, as directed in July last.

Costs of the motion will abide the final disposition of costs in the action.

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JELLINGHAUS v. THE NEW YORK INSURANCE COMPANY.

1. Where a defendant has a verdict against him at the trial, and makes a case to which amendments are served, and judgment is entered on the verdict while the case and amendments are with the Judge to be settled, the Court has the power, after the time to appeal has expired, to relieve the defendant from the judgment, and permit him to be heard on the case.
2. But in order to justify the granting of such relief, the case should be one of unquestionable mistake on the part of the defendant, and evince perfect good faith, and should be meritorious.
3. Granting such relief even in such a case is going to the extreme verge of judicial discretion.
4. If granted, it should be upon terms of securing to the plaintiff payment of his verdict and costs, if a new trial is denied; and an election to admit service of notice of appeal as of the time that it might have been served as a matter of course, and thus restrict the defendant to a hearing, upon such appeal, of any exceptions he may have taken at the trial.

(Before BOSWORTH, Ch. J., and HOFFMAN, WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, February 18; decided, February 25, 1860.

THIS action was tried on the 28th of January, 1859. A case containing exceptions taken at the trial was served on the 10th of February, and amendments thereto on the 8th of March, and soon thereafter the exceptions and amendments were left with the Judge to be settled, and were settled in July, 1859.

In the meantime, and on the 19th of May, judgment was perfected and notice thereof was served on the defendants' attorney, but no appeal was taken from the judgment.

After the case was settled and had been engrossed, and in September, 1859, the attorneys met together and examined it with a view to see that it was correctly engrossed and in a proper condition to be printed. The plaintiff's attorney did not then suggest that the defendants had no right to be heard further, and undoubtedly for the reason that he took it for granted that a notice of appeal had been duly served. Under date of September 20, 1859, plaintiff's attorney wrote to defendants' attorney thus: "I learn from my Clerk that no appeal was ever taken in this case."

From that time until the 30th of November, 1859, the attorneys had interviews oral and written as to the posture of the case, and with a view on the part of defendants' attorney to procure a removal of the obstacles to his being heard on the exceptions. The position taken by the plaintiffs' attorney was, that although he was willing to oblige the defendant's attorney in every way possible consistent with his duty to his client; yet that judgment had been regularly entered and notice thereof given, the time to appeal had elapsed, and the case and exceptions could not be heard, and he was not at liberty and had no power to waive the rights which his client had thereby acquired.

The affidavits show that the defendants' attorney acted in perfect good faith, and at no time suspected there was a doubt of his right to be heard on the exceptions, until he received the note of the 20th of September, 1859; and that he mislaid and entirely forgot that a notice of the entry of the judgment had been served upon him. On the 20th of November, 1859, he gave notice of a motion to set aside the judgment for irregularity, on the ground that the making of the bill of exceptions, service of, amendments thereto and submitting the same for settlement operated as a stay of proceedings; and at all events to be relieved from it on terms on the ground of surprise and mistake.

That motion was denied by an order made on the 16th of January, 1860, and from that order the defendants appealed to the General Term.

R. S. Emmet, for appellant.

B. D. Silliman, for respondent.

BY THE COURT—BOSWORTH, Ch. J. Section 174 [149] of the Code allows the Court "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment * * taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Before the Code, and prior to the passage of the act of the 13th of April, 1832, (chap. 128,) it was well settled that the service of a bill of exceptions, of amendments thereto, and a sub-

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mission of them for settlement before judgment had been entered, operated *per se* as a stay of proceedings. (*Roosevelt v. The Heirs of Fulton*, 7 Cow., 107; *Pelletreau v. Moore*, 9 Wend., 493.)

The act of April 13, 1832, allowed judgment to be entered after the exceptions were settled or a case had been made, and the exceptions to be heard subsequently. But that act in terms applied only to the Supreme and Circuit Courts, and did not affect proceedings in this Court, or in the Courts of Common Pleas of the several counties.

The rule in those Courts continued unchanged down to the time the Code took effect. Prior to the act of 1832, bills of exceptions taken at the Circuits were heard in the Supreme Court before judgment was entered. Those taken in the Courts of Common Pleas (except the city and county of New York) were reviewed in the first instance by a writ of error from the Supreme Court to the inferior Court.

The Code declares that a motion for a new trial on a case or exceptions, * * * must, in the first instance, be heard and decided at the Circuit or Special Term, except in a single specified case.

It is not surprising that an attorney, conscious that his adversary was distinguished for his fairness and liberality, and therefore not feeling any necessity for extreme watchfulness over the regularity of his proceedings, and having totally forgotten that a notice of entering judgment had been served; should have deceived himself into the conviction that his proceedings were regular and that he had secured the right to be heard on the exceptions. And the plaintiff's attorney, in declining to waive the default now, does so only because he supposes he has not the power, authority and right to do it.

But the defendants' attorney does not, by his affidavits, show that he supposed the plaintiff was stayed, by the submission of the proposed exceptions and amendments for settlement, from entering judgment; he seems to have had and acted upon the impression that he would be heard as a matter of course at the General Term.

We think that section 264, [219,] by declaring "that if a different direction be not given by the Court, the clerk must enter judgment in conformity with the verdict," in effect, enacts that

proceedings shall only be stayed by order of the Court. And that if no stay be granted by the Court or a Judge before judgment is perfected, the defeated party cannot subsequently make a motion for a new trial under section 265 of the Code. Such party, however, if he has taken exceptions may appeal from the judgment and on such appeal have the exceptions considered, provided he prepares a bill of exceptions and has it settled, within the time prescribed by the rules of the Court.

If the meaning and effect of section 264 be not such as is above suggested, then it does not occur to me that the provisions of the Code are inconsistent with the rule declared in 7 Cowen and 9 Wendell, (*supra*,) and if they are not, section 469 would justify the belief that it continued in force.

But I think the provisions of the Code do not favor the conclusion that a bill of exceptions *per se* stays the entry of judgment. It did not in the Supreme Court after the act of 1832 (*supra*) was passed, and that act has no application to suits commenced under the Code.

In this view the plaintiff is entirely regular. The defendants had no right to be heard at Special Term after the judgment had been regularly perfected. (15 J. R., 354; 4 Hill, 125.)

They could not be heard at General Term because they omitted to appeal within the time allowed by law.

It is very clear, however, that this has resulted from the mistake of the defendants' attorney. And, practically, the question is, is he so utterly without excuse that his clients must abide by the consequences of it.

It is very clear, that he acted in good faith. He prepared his case promptly; and there seems to be no want of diligence, after he knew it was settled, to get it in a condition to be brought before the Court.

He had forgotten that he had ever been served with a notice of judgment, and even now has no recollection of it. This is easily explained, when it appears that he supposed he had a right to be heard as a matter of course. Having that conviction, service of such a notice would be regarded by him as unimportant, and would make no impression and would not be recollected.

Some two months at least, after the time to appeal had expired he and the plaintiff's attorney met and compared an engrossed

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copy of the bill of exceptions with the proposed exceptions and amendments, and the alterations therein, made by the Judge in settling them.

This labor was expended by both attorneys under the conviction of both, that the case was one on which the defendants had a right to be heard, and on which he would be heard as a matter of course, the one supposing that no notice of appeal was necessary, and the other that a notice of appeal had been duly served.

In the present case, a hearing can be had, without subjecting the plaintiff to any prejudice, except such as may result from the mere delay that must occur to enable such hearing to be had. The defendants can be compelled, as a condition to granting them any relief, to give perfect security to pay the sum recovered with interest and costs, if such security be deemed of any importance.

Under such circumstances, as the good faith of the defendants' attorney cannot be and is not questioned, as it is indisputable that it is wholly owing to his mistake, in respect to the proper practice to be pursued, that his clients have lost the privilege to be heard as a matter of strict right; and as a hearing can be had without much delay, and as the plaintiff can be made perfectly secure of being paid the verdict, with interest and costs, (if the verdict be just and ought to stand,) I think the plaintiff should be relieved from the judgment.

It is not questioned that the exceptions taken present points deserving a careful consideration.

In *Case v. Shepherd*, (1 J. C., 245, in 1800,) the Court allowed a motion for a new trial on a case to be heard after judgment perfected, on the ground that the defendant's attorney had misconstrued the 4th Rule of January Term, 1799. In the same case, the rule was stated to be that the Court, "will not hear an argument to set aside a verdict, default or inquisition, after a judgment has been duly entered."

In *Jackson, ex dem., v. Chace*, (15 J. R., 354, in 1818,) the Court refused to hear a motion for a new trial on the ground of newly discovered evidence, noticed to be made after judgment perfected. The Court said, "in no case has a motion for a new trial been heard, after a judgment has been regularly perfected. The case of *Shepherd* arose soon after the present rules and orders of the Court were made, and the Court, under the particular circum-

stances of the case, of an alleged misapprehension of the meaning of the 4th Rule of January Term, 1799, allowed the motion to be made."

In *Savage v. Hicks*, (2 Wend., 246, in 1829,) thirty years after the practice had been settled, that such a motion could not be made after judgment perfected, the Court granted that relief, on the ground that a case had been made in good faith and served before the judgment was entered. It was an inadvertence of the attorney that he had omitted to obtain a stay of proceedings until the case could be heard. (*Hawkins v. The Dutchess and Orange Steamboat Co.*, 7 Cow., 467.)

In the present suit as in that, a case was duly made and settled, and it was done in good faith. In this suit, after the case was settled, the attorneys met together and compared it with an engrossed copy, so that it could be ascertained that the defendants' attorney might have it printed or copies made for the hearing, without any hazard of future changes by a motion to resettle it or otherwise, and both attorneys undoubtedly then supposed that the defendants could be heard upon it as a matter of strict right.

During the interval between the passage of the act of April, 1832, (*supra*), and the enactment of the Code, the right to be heard after judgment perfected, in actions in the Supreme Court, was a strict right.

The Code, as enacted in 1848, did not permit a judgment to be entered until after the expiration of four days from the verdict. (Laws of 1848, p. 538, § 220.)

As amended in 1849, judgment could be entered at once, and it became final after the expiration of four days, "unless the Court or a Judge thereof ordered the case to be reserved for argument or further consideration, or granted a stay of proceedings. (Laws of 1849, p. 667, § 265.)

This language might be understood as authorizing a motion for a new trial after judgment entered, provided an order was obtained within the four days directing it, or staying proceedings.

The Code, as amended in 1852, authorized the Justice trying a cause to "stay the entry of judgment and further proceedings thereon" until a motion for a new trial could be heard and decided, whether made upon the grounds of surprise or irregu-

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larity, or upon a case or bill of exceptions. (Code of 1851, § 264.)

In 1852, sections 264 and 265, so far as they affect the questions of practice now under consideration, were enacted in their present form. They omit the provision found in section 264 of the Code of 1851, as to staying the entry of judgment, and as section 264 now reads, the clerk must enter judgment in conformity with the verdict if a different direction be not given by the Court.

However plain the practice may appear to those who understand it correctly and are perfectly familiar with it, I think the evidence is entirely satisfactory that it was misunderstood in the present instance, and that the attorney was using respectable diligence to prepare for a hearing upon the case, which he had made in entire good faith. He presents grounds addressing themselves more forcibly on behalf of the equitable interposition of the Court than are disclosed by the report of *Savage v. Hicks*; and as no injury can result to any party from granting the relief sought, while possibly the ends of justice may be promoted, the defendants should be permitted to be heard.

At the same time I deem it proper to say, that to justify the granting of such relief the case should be one of unquestionable mistake, and evincing perfect good faith, and should be meritorious, and even then to grant such relief is going to the extreme verge of judicial discretion.

The judgment may be set aside on payment of the costs of entering it, and of the subsequent proceedings, including \$10 costs of this appeal, and giving security for the payment of the verdict, with interest and costs; but the plaintiff's attorney, by electing to admit due service of a notice of appeal from the judgment, as of a day when it might have regularly been served, may retain the judgment and restrict the defendants to a hearing of their exceptions upon such appeal.

Ordered accordingly.

RUBERRY v. BINNS and HALSTED.

1. On an application for a discovery of books, in order to enable the plaintiff to prepare his complaint, if it appear that the plaintiff is seeking to recover moneys received by the defendants, as his factors and agents, selling his goods, and they have not rendered accounts of sales in full, the Court will order them to render such account or give a copy of their book showing such sales from the time of the last account of sales rendered. The plaintiff, upon those facts, is entitled to such account of right.
2. But under color of an application for such a purpose, the plaintiff is not entitled to examine the defendants' books at large, or to have copies of them, for the purpose of seeing whether they conflict with the accounts of sales heretofore rendered.

(Before WOODRUFF, J.)

At Special Term; March 10th, 1860.

THE plaintiff herein having commenced this action by service of the summons, applied by motion to compel the defendants to produce their books of account and submit them to the plaintiff for his inspection, or to furnish the plaintiff sworn copies of so much and such parts of their books as contained any memorandum or entry relating to goods consigned to them, as the factors and agents of the plaintiff, for sale; and the ground on which the discovery was sought was, that the defendants were such agents and factors, that the action was brought to recover from them the property and proceeds of sales, and that the discovery is necessary to enable the plaintiff to frame his complaint in this action.

The defendants showed, in opposition, that they had rendered full and detailed accounts of all sales made down to July, 1859.

Weeks & De Forest, for the plaintiff, in support of the motion.

J. D. & T. D. Sherwood, for the defendants, in opposition thereto.

WOODRUFF, J. As the agents or factors of the plaintiff, the defendants are bound to render accounts of goods sold and moneys collected, and the right of the plaintiff to have such an

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account, upon the facts stated in the affidavits on both sides, admits of no controversy; and it is reasonable that the plaintiff should have the information which such an account would furnish, before he is compelled to frame his complaint.

But there is no necessity that he should be permitted to examine the defendants' books at large. He can frame his complaint without any such aid.

He presumptively knows what goods the defendants have received. He has received accounts down to July last. He is not entitled to a discovery for the purpose of exploring the books to see whether perchance he may not discover something in conflict with the accounts rendered.

The defendants must furnish a sworn statement of all sales made and moneys collected since the 1st of July last, or produce and deposit with the clerk of the Court such of his books as will show those sales and receipts.

Costs of motion, \$10, to abide the event.

EMIL HEINEMANN, Plaintiff, (Appellant,) v. BENJAMIN WATERBURY, Defendant, (Respondent.)

1. Upon the filing of the decision of a Referee determining the cause, it is the duty of the clerk to enter the judgment directed by such decision; and if the prevailing party does not choose to furnish to the clerk a judgment roll, it is the duty of the clerk to collect from the files such papers as constitute such roll, and attach thereto a copy of the judgment. (Code, § 281.)
2. It is optional with the prevailing party to furnish a judgment roll or not, and he cannot be compelled by an order the Court to cause a judgment roll to be filed.
3. An order requiring the prevailing party to cause the judgment roll to be filed, and to pay costs of the motion, is an appealable order, and will be reversed.
4. The question whether, when a judgment by default has been directed to stand as security, but the defendant suffered to defend, a second judgment should be entered on a subsequent recovery of verdict or decision by a Referee in favor of the plaintiff, discussed by HOFFMAN, J.
(Before HOFFMAN, WOODRUFF, PIERREPONT, MONCRIEF and ROBERTSON, J. J.)
Heard, March 17th; decided, March 31st. 1860.)

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THE order appealed from in this case is as follows: On reading and filing affidavit of Benjamin Waterbury and notice of motion and order to show cause, and after hearing, &c., ordered that the plaintiff cause the judgment roll in this action, upon the report of the Referee therein, to be filed within ten days after service of a copy of this order, and pay to the defendant's attorney \$10 costs of this motion.

The notice of motion was for an order directing the plaintiff to file the judgment roll, or permitting the defendant to do so.

The affidavit on which the motion was made set forth that the action had been referred to a Referee, who made his decision on or about the 16th of January, 1860, in favor of the plaintiff; that the costs were taxed on the plaintiff's notice on the 3d of February, 1860; that on the trial some exceptions were taken by the defendant's counsel to the ruling of the Referee; that the defendant desired to appeal to the General Term from the decision, and in order to do so is desirous that the judgment should be entered and the judgment roll filed; that the plaintiff's attorney has been requested to enter the judgment and file the judgment roll, but has declined to do so.

It appears from an order in the cause of the 24th of December, 1858, that a motion had been made to set aside an inquest, judgment and levy under an execution in the cause, on which motion the defendant was permitted to have a trial of the issues joined in the action, for which purpose it was referred to W. Mitchell to hear and determine the issues joined therein, and that the judgment already entered, and the levy under the execution issued therein, stand as security for any amount that may finally be recovered by the plaintiff. Permission was given to have the execution and levy vacated upon certain terms as to security. It is not stated whether those terms were complied with and the execution and levy set aside or not.

From the order peremptorily directing the plaintiff to cause a judgment roll to be filed as above stated, the plaintiff appealed.

Jeremiah Larocque, for appellant,

Among other things, insisted that there could not be two judgments in the same action.

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That he was entitled to retain the judgment first entered in favor of the plaintiff, with all the advantages which the entry and docketing thereof and the levy made secured to him; and that if he were to enter a second judgment, or assent to such an entry, such second judgment would waive or annul the first. (*Murray v. Judah*, 6 Cow., 484.)

Dudley Field, for respondent,

Insisted that it was the duty of the prevailing party to file a judgment roll and enter the judgment, when entitled to a judgment in his own favor, or to see to it that it was done by the clerk, and that in any event, if the plaintiff did not do this, the defendant should be permitted to do so.

Also, that the order of the Special Term in this case is not appealable. (*Union Bank v. Mott*, 8 Abb., 150; *Bowman v. Earle*, 8 Duer, 691; *Bank of Geneva v. Hotchkiss*, 5 How. Pr. R., 478.)

HOFFMAN, J. The Code (§ 272) directs that the report of the Referees upon the whole issue shall stand as the decision of the Court, and judgment may be entered thereon in the same manner as if the action had been tried by the Court.

By section 267 the decision of the Court shall be given in writing, and filed with the clerk. Judgment upon the decision shall be entered accordingly.

By sections 278, 279 and 280 a judgment on the report of a Referee is to be entered in a book kept by the clerk, and called a Judgment Book. Section 281 contemplates that the clerk enters the judgment.

The report must be in writing, and must be filed like the decision of a Judge. *Sands v. Church*, (2 Seld., 347,) determines that there should be something to authenticate the judgment—something that shall place it beyond doubt what is the precise point decided, which must be the written decision of the Judge, although there was not ground enough to reverse the judgment for that omission in the particular case. In *Renouil v. Harris*, (2 Sandf. S. C. R., 642,) it was stated that it is the clerk's duty to enter up the judgment upon the report being filed; that the duty of the prevailing party ends when he has filed the decision and adjusted the costs. It is then the clerk's duty to enter the judgment and make up the judgment roll. The party has no

control, nor anything to do with it beyond seeing that all the papers he is bound to furnish are on file.

It seems to me that the motion below, and the order appealed from, were unnecessary.

But it is contended that the order is not appealable; that it does not affect any substantial right.

It is urged by counsel for the plaintiff that the new judgment may supersede the old one, and rob the plaintiff of the benefit of a docket, or of the levy. There cannot be two judgments.

In *Miller v. The Eagle Life and Health Insurance Company*, (3 E. D. Smith, 184,) it is stated that the practice in that Court had always been, where a judgment had been opened and a new trial ordered, but the judgment allowed to stand as security, to require a new judgment to be entered for the amount recovered on the second trial, without reference to the previous judgment. Such, however, was not the case then before them.

In *Pierce v. Thomas*, (4 E. D. Smith, 354,) the Court say that, in relation to the claim made in the notice of appeal to reverse two judgments, it was sufficient to say that, as the first stands only as security for the second, it must fall with it.

These cases cannot be understood as implying that the new judgment could have the effect of destroying the effect of a docket upon real estate or a levy upon personal property, if either had been obtained. This would be exactly contradicting the determination of the Court, upon the admission of the defendant to defend, that the judgment then existing should stand as a security.

On the other side, the defendant cannot be deprived of all the benefits which he can have, upon the trial and upon an appeal from the decision, of any objections to the cause of action or the adequacy of the proofs to establish it. If he fully succeed, the judgment ordered to stand as security would fall. If he partially succeed, it will be so far affected.

I think the decision in *Swarthout v. Curtis*, (4 Comst., 415,) may aid our determination. The decree set aside a satisfaction-piece, declared a certain instrument to be a mortgage, and adjudged a foreclosure; referred it to a County Judge to compute the amount due, and directed that, on the confirmation of the report, the premises should be sold, &c., and the plaintiff to

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have execution for any balances. It was held that this decree was not appealable to the Court of Appeals, under the Code. But, after the report had been made and confirmed, it did become appealable.

In *Tompkins v. Hyatt*, (19 N. Y. R., 584,) this case was recognized and applied. There might be further litigation between the parties as to the amount of an allowance for use and occupation. Until that was settled, it could not be completely adjudged to whom the entire proceeds of the premises directed to be sold would belong.

The following remark of the Court is pertinent to the present case: "It is suggested by the plaintiff's counsel that, if the appeal is not sustained, the judgment of the Supreme Court may be completely executed before an opportunity will be afforded to perfect another appeal, as the Sheriff will be authorized to pay over the whole proceeds of the premises on the filing of the report, before any opportunity is afforded to contest it or to review the judgment. This, we think, is a matter for the Supreme Court to regulate. That Court would, no doubt, by order, suspend the payment of the money until an opportunity to appeal should be afforded, after the final confirmation of the report."

Some propositions seem to me clear. There can be no appeal to the General Term, under section 848 of the Code, until the judgment becomes final, by the decision of the Referee being entered as a judgment. (8 Duer, 689.) The lien, by docket or levy of the judgment by default directed to stand as security, cannot be impaired by the plaintiff himself entering up the final judgment. The Court has the power to render the docket or levy available, by directing the execution heretofore issued to be carried into effect.

But the plaintiff was under no legal duty to do that which the order directed him to do. By the 281st section, the absolute duty of making up the roll is imposed upon the clerk, which he is to do immediately after entering up the judgment. The section gives liberty, merely, to the party, or his attorney, at his option, to furnish a judgment roll, enabling him to hasten the act. His obligation only extends to the filing of such of his own papers as, in the progress of the cause, his adversary may require to be filed; which papers, (if he do not choose to furnish a judg-

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ment roll,) the clerk must collect in making up the roll, and annex thereto the copy of the judgment.

If, when the clerk makes up the roll, it appear that any of the pleadings or proceedings on the part of such prevailing party, which form a part of the judgment roll, have not been filed, doubtless, on the motion of the adverse party, he may be required to file them; but that was not the motion made in this action, and it is not the order appealed from. The order should be reversed, but without costs.

The Justices before whom the appeal was argued concurred in reversing the order, and in the points stated in the head-note of the decision.

Order reversed, without costs to either party.

THE RECTOR, &c., OF THE CHURCH OF THE HOLY INNOCENTS,
Appellants, v. THOMAS KEECH, Respondent.

1. Where a party obtains the privilege of building a party wall, one-half on his own lot and one-half on the lot of another, and covenants that he will build such wall, but does not extend the wall so far as, by his covenant, he is bound to do, and thereupon the other party enters upon the ground and begins to extend the wall upon the land of each to the stipulated point or line, the latter will not be restrained by an injunction, at the instance of such party in default, from making the extension.
2. Even if, in such case, the party extending the wall has not obtained a strictly legal title to any of the ground of the other, or to the use thereof, still a Court of equity will not restrain him from doing what ought to be done, and what the other was bound to do for him.
3. But, where the point, or line, to which the party wall was to be extended by the party covenanting, is in dispute, and it is not clear what, in that respect, is the true construction of the covenant, and where, also, the extension of the wall, as attempted by the other, will require the cutting away of a stone stoop or portico and do permanent injury to the building of the former, the Court will interpose by injunction, *pendente lite*, and restrain the extension until the right can be ascertained and settled by the aid of such extrinsic facts as may be properly proved to aid in determining the true meaning and effect of the covenant.

(Before HOFFMAN, WOODRUFF, PIERREPONT, and MONCHIEF, J. J.)

Heard, April 21; decided, April 28, 1860.

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THIS action is brought for the purpose of restraining the defendant from removing a portion of the stone stoop or portico of the plaintiffs' building on the southerly side of Thirty-seventh street, and from extending the westerly party wall thereof, northerly, in part on the plaintiffs' ground, to the southerly line of the street.

The complaint shows that the defendant, being owner of the adjoining lot, is about to do the acts thus specified and has actually begun to dig away the earth for that purpose. It also shows an agreement between the plaintiffs and the defendant, by which, the plaintiffs being about to erect a building on their lot, it was agreed that "so much of the westerly wall of said building as is hereinafter mentioned shall stand one-half on the land of each of the parties;" and the instrument described such part of the wall, and gave the privilege of placing it one-half on the defendant's land, thus: "it shall and may be lawful for the parties of the second part to erect one-half of the westerly wall of the said building, *from the front wall thereof* to the front wall of the building now standing on the rear of the said lot of the party of the first part, being *sixty-six feet five inches in length* upon the lot of the party of the first part, and the same so to continue forever as and for a party wall." The plaintiffs covenanted forthwith to erect the said wall, and that the defendant should have the privilege of using it upon the payment of one-half the value of so much as he shall use.

The front of the building erected by the plaintiffs had near its centre a projecting bay window, nine feet in length on a foundation wall eighteen inches in thickness, the front of which was on the line of the street; but the front wall on each side of the window retreated from the street line two feet eight inches, so that at the northwest corner, where it reached the defendant's lot, it was two feet eight inches from the street line, and the party wall built by the plaintiffs began at that front wall at the northwest corner and ran southerly, (six inches on the land of each party,) to the defendant's rear building. At this northwest corner the plaintiffs erected a stone stoop or portico extending westerly to the division line between the two lots.

The defendant claimed that the party wall should have been extended northerly to the street line, and the plaintiffs neglecting to

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so extend it he was about to make the extension himself and use the whole party wall as a support to a building he was about erecting.

The distance from the defendant's rear building to the street line was sixty-six feet four inches.

The plaintiffs alleged that the plans of their building showed that their front wall was not on the street line, and that the defendant had the plans in his possession and proposed as carpenter to do a part of the work, and therefore knew the location of the front wall proposed to be built before the agreement for a party wall was made; and therefore that the words "from the front wall thereof," in the agreement, had a definite and precise meaning and must control the distance, sixty-six feet five inches, contained in it.

The defendant on the other hand denied that he knew where the front wall of the plaintiffs' building was to be located, and insisted that although he could not require them to build the party wall sixty-six feet five inches, they were bound to extend it sixty-six feet four inches, *i. e.*, to the street line.

On the hearing of the motion at Special Term before Mr. Justice MONCRIEF, the motion for an injunction was denied and the plaintiffs appealed to the General Term. Some other particulars are stated in the opinion of the Court. Affidavits were read on both sides for the purpose of showing, by extrinsic facts and circumstances, whether the plaintiffs' front wall was so fixed and located that it should govern the construction of the agreement, and whether the defendant knew it when the agreement was executed, &c.

Edward Hoffman, for plaintiffs, (appellants.)

Richard O'Gorman, for defendant, (respondent.)

BY THE COURT—WOODRUFF, J. If, according to the true construction of the agreement between the parties, interpreted by the assistance of any extrinsic facts which may legitimately be brought into view to aid in such construction, it be clear that the plaintiffs were bound to construct the party wall from the rear building to the street line, or a distance of sixty-six feet four

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inches; that the defendant could maintain an action for the specific performance of that agreement and compel the plaintiffs to make such erection; and that he could if he so elected recover damages from the plaintiffs for a breach of the said agreement in their neglect to extend the wall to the street line; then in my opinion the plaintiffs have no standing in this Court upon the complaint which they have filed, and have no title to invoke the extraordinary powers of this Court as a Court of equity to restrain the defendant from doing what he proposes to do, what the plaintiffs covenanted to do, and what in equity and good conscience ought to be done.

It may be true that the defendant has not (even though his right be clear as above assumed) acquired any legal title to any portion of the plaintiffs' land, nor a legal title to the possession thereof, nor a strictly legal right to enter thereon against the will of the plaintiffs, and that therefore such an entry would be in law a trespass; but if this be so it does not follow from such a concession that the defendant should be enjoined. It is by no means every case of trespass upon lands that warrants an appeal to a Court of equity, nor every invasion of a merely legal right that calls for the interference of that Court. If the act of the defendant does not and cannot cause any injury to the plaintiff, there is no ground upon which the jurisdiction of a Court of equity can be sustained; and, upon the assumption above stated, the acts of the defendant complained of can by no possibility in judgment of a Court of equity injure the plaintiffs; that Court must say that the defendant by doing what ought to be done, and what the plaintiffs themselves ought to have done but refuse to do, cannot injure the plaintiffs; and therefore this Court have nothing to do in the matter.

If the defendant violates the naked legal right of the plaintiffs they must seek legal redress, but equity finds no injury therein to be redressed or to be prevented. If the defendant's acts are a trespass, he performs them at the peril of being held in a Court of law liable to legal damages. Whether in such a case they would be great or small; and whether as a mere question of law such an agreement and the breach thereof by the plaintiffs would or would not be any defense; and whether or not those circumstances would or would not reduce the damages in a Court of

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law to a merely nominal amount, it is clear that in equity the plaintiffs being without excuse and prosecuting in resistance of the defendant's just and equitable rights, would be deemed entitled to nothing and should be dismissed from the Court.

If there is any rule of a Court of equity that is more than any other primary and fundamental, it is that a plaintiff seeking the aid of that Court must come with clean hands. He must do equity, or his complaint shall not be heard. In the strong language of the books, "he that doeth iniquity shall not have equity."

Surely a plaintiff cannot successfully invoke the aid of the Court to protect him in violating his contract, in refusing to the defendant what is the clear equitable right of the latter.

If the construction above stated is clear, these plaintiffs have induced the defendant to enter into an agreement under which they have obtained the use of a portion of his land, they have taken and are actually enjoying the benefit of all the advantages secured to them by the agreement, which they desire to take and enjoy, they have violated the agreement in a particular which is advantageous to him. They refuse to him the benefit to which he was entitled by the agreement, and now when he seeks to appropriate to himself only that portion of the land which they covenanted he should have, and to erect thereon a wall which they covenanted to erect for him, and which he is now entitled to compel them to erect for his benefit, they ask a Court of equity to interfere and protect them in their wrongdoing. And this when it is quite apparent that permanent and substantial if not irremediable mischief to the defendant's house must result if such wall be not erected, for if not erected on the line of the portion already built, and in extension of that portion, he must either lose entirely the use of the front portion of his lot, or he must build so that his wall shall project into the front portion of his house, and so permanently impair its usefulness and value.

On such a claim, and under such circumstances, the plaintiffs can have no standing in a Court of equity, whatever may be their strict or technical legal right to the land in question.

I am, however, of opinion that, as the case now appears upon the papers submitted, the defendant should be temporarily restrained from interfering with the stoop of the plaintiffs' house or building upon their land.

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I do not think it clear that the plaintiffs were bound to extend the party wall further towards the street than they have done, or that the agreement, construed in the light of the extrinsic facts, contemplated any other party wall than the plaintiffs have in fact erected. And if it be not clear that the defendant is entitled to have the wall erected where he now proposes to erect it, then, until the rights of the parties in this respect can be ascertained and settled by a full investigation and a determination upon all the proofs regularly taken on a trial of the cause, all things should continue as they now are, and for this palpable reason that it is entirely clear that, if the defendant be not so entitled, his cutting away of the plaintiffs' stoop and building on their land will do them a serious and permanent, and, in a just sense, irreparable injury.

It is true that the general rule is, that in cases of doubt an injunction should not be granted, *i. e.*, the plaintiffs should make a clear case; but this rule is not without qualification, and no better illustration is necessary than the present case affords. The plaintiffs are the legal owners of the land upon which the defendant threatens to build. They are in possession, and have occupied the ground by a permanent erection. According to the case made by them, the defendant has no right whatever to encroach upon them, unless the facts show him to be equitably entitled to build his wall where he proposes to place it. His doing so while the suit is pending will work permanent and substantial damage to the plaintiffs. In such case, if the defendant's right is doubtful, he should not be permitted to go on until the right is settled. This is reasonable and just. His delay can cause no loss for which he cannot be fully compensated, and for that compensation he can have security. In this respect, the condition of the parties is not equal. He can only lose the temporary use of his unimproved lot. The plaintiffs are in danger of a permanent injury to their building.

I do not design to intimate, that I am satisfied that the plaintiffs are right and that the defendant is clearly wrong in claiming to have the party wall extended, but only that, in a doubtful case of this description, all things should continue as they are until trial and judgment.

The doubt in my mind of the defendant's right arises out of these considerations.

Although the agreement speaks of the party wall as "being sixty-six feet and five inches in length," it is not denied that this description of the distance must yield if the *termini* are fixed and certain, and the distance between these *termini* is less than the description mentions.

The agreement recites that the parties of the second part are about to erect a building on their lot, and declares that it shall and may be lawful for them to erect one-half of the westerly wall of the said building from the front wall thereof to the front wall of the building now standing in the rear, upon the lot of the party of the first part.

Now, it may be conceded that if nothing more appeared in the case than the added words, "being sixty-six feet five inches in length," it would be plain that the wall which it was lawful for the plaintiffs to build, and which they in the subsequent portion of the agreement agreed to build, was to be of that length. But if this be on the mere face of the agreement its apparent meaning, it is not its inevitable and conclusive import.

For example, suppose it were shown that at the time of the making of this agreement, the front wall of the plaintiffs' building was definitely located, and this was known at the time to both parties; as for instance, by laying its foundations or marking out its place, or, more strongly, by its actual erection in so far as it rested on the plaintiffs' own ground; then, most plainly, the plaintiffs would only be bound to build the westerly wall from such front wall back towards the rear to the rear building referred to.

It is not alleged that such wall had been in fact begun, but it is insisted that its location was fixed and settled, that a plan thereof had been drawn showing such location. That such plan was in the defendant's possession, and had been made the basis of an estimate by which he offered to do the carpenter's work of the very building in question, and that he therefore knew before the agreement was made where the front wall from which the party wall was to run, or at which it was to begin, was in fact located, so that, in contemplation of both parties and in very truth, it had a fixed location as truly as if a monument had been attached to the soil at that place.

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The defendant does not deny that he had the plan before the agreement was made, but he denies that he derived therefrom any knowledge that the front wall in question was not on the line of the street.

In this I do not say that the defendant may not possibly be right, but an inspection of the plan shows most clearly, as it seems to me, that the front wall at the ground or first floor of the contemplated building was not a straight line. That in the middle and by a wall of eighteen inches in thickness it projected more than two feet beyond the wall at the front entrance of the house, where it adjoined the westerly line of the lot. This was information to him either that the middle portion of the wall (which inclosed a width of over nine feet) projected into the street, or that the front, at the place where it adjoined the westerly wall, was placed over two feet southerly of the street. It may have been possible for him to suppose that this projection was only into the space commonly used as an area way, and that such a projection was lawful though within the street lines; yet an examination of the plan, with its marks and figures, and coloring, its area steps and front platform, suggests to my own mind that a person familiar with drawings, plans and buildings, as a building carpenter may be presumed to be, could not fail to see that the proposed front wall, at the westerly end thereof, was not on the street line. Indeed the plan of the second story also shows that the front of the easterly portion thereof projects, though in a less degree, further towards the street than the front wall at the westerly end thereof.

Add to this the fact that the building was erected, the defendant being from time to time present and seeing its progress, and no suggestion was made that the front wall was not where it was contemplated it should be until after it was built. Is it probable that this wall was nearly three feet back of the line of the street, and the defendant not only did not know it but supposed it was on the street line? He says he did not know it and his testimony is entitled to consideration, but all the circumstances seem to me to render it doubtful whether this front wall was not in fact erected where it had been located, and where both parties knew it was located when the agreement was made. I nevertheless desire not to state or form any decided opinion upon this

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part of the case. I rest my conclusion on the view above stated, that the case is not so clearly with the defendant upon the papers before us, that he should be suffered, pending the litigation, to cut away the plaintiff's stoop and build on their lot in front of their building.

If the plaintiffs were here seeking to restrain him from building on his own lot, the burden of removing the doubts which appear upon the evidence might devolve upon them, but all they ask now is that their own property be not interfered with.

Order appealed from reversed, and injunction ordered.

GEORGE B. BOSWELL, Administrator, &c., of John B. Boswell, deceased, Plaintiff, (Respondent,) v. THE HUDSON RIVER RAILROAD COMPANY, Defendants, (Appellants.)

1. To an action for an injury to the person sustained, by one who was riding in a car of a Railroad Company, through the alleged negligence of the servants of the Company, it is a good defense that the person injured was at the time riding by virtue of a special contract which was evidenced by a pass or free ticket accepted and used by him to enable him to take charge and care of his live stock while on the railroad, and as part of the contract for transporting such stock, which contained an express stipulation that "by accepting or using it he expressly releases the Company, in consideration of this pass and the reduction of price below the tariff rates, from all liability for injury to said stock from suffocation, crowding, trampling, or delay in transportation, or for injury to his person or stock arising from any cause whatsoever," the answer also averring that the injury to the person was not caused by any fraudulent, willful or reckless act or misconduct or gross neglect.
2. A Railroad Company may limit their common law liability as carriers of passengers, by express contract with the passenger upon sufficient consideration, so as not to be liable for casualties not arising from fraud, willfulness, recklessness, or gross neglect.

(Before HOFFMAN, WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, April 14th; decided, April 28th, 1860.

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APPEAL from an order sustaining a demurrer to the defendants' answer and ordering judgment for the plaintiff, with leave to the defendants to amend within twenty days.

The complaint alleged in substance and among other allegations, that John B. Boswell, the plaintiff's intestate, on the 8th of September, 1858, at the defendants' request became a passenger in their car to be carried by them as common carriers from East Albany to the city of New York. That defendants undertook and it became their duty to carry him safely, but defendants and their agents conducted so negligently that the car, in which he was, came in contact with another car or locomotive and was demolished or thrown from the track, and the said John B. Boswell, then and there, from such gross negligence of the defendants, was instantly killed or received great injury, from which he immediately died. And the death of said John B. Boswell was caused by and was the result of the gross negligence of the defendants.

The answer contained denials of many of the allegations in the complaint, but the defense demurred to was as follows:

"And for a further and separate defense, the defendants further answering, say: that at the time and place in the complaint mentioned, the said John B. Boswell was upon the cars of the defendants, not as a passenger, nor upon the payment of, or promise to pay, any fare, but under and in virtue of a special contract made between the said Boswell and the said defendants, which contract was evidenced by the pass or free ticket given to him by the defendants, and accepted and used by him, and by virtue of which he was riding upon the road and in the cars of the defendants at the time of the alleged injury. That the conditions of the said contract, by which the defendants agreed to carry the said Boswell, were printed upon the face of the said ticket or pass; and were in the words following: 'Conditions. This ticket is issued to the owner of Live Stock, or his agent, to enable him to take the entire charge and care of his stock while on the Hudson River Railroad, and is part of the contract for transporting the same. By accepting or using it, he expressly releases the Company, in consideration of this Pass, and the reduction of price below the Tariff Rates, from all liability for injury to said stock from suffocation, crowding, trampling or delay in transporta-

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tion, or for injury to his person or stock, arising from any cause whatsoever.'

"That the said ticket was accepted and used by the said Boswell at the time of the injuries alleged to have been sustained by him, and that the said injuries were not caused by any fraudulent, willful or reckless act or misconduct or gross neglect or default on the part of the defendants, and that the defendants are not liable therefor."

The plaintiff's demurrer was on the general ground that the facts stated did not constitute a defense.

William Fullerton, for defendants, (appellants.)

I. Common carriers of goods may, by express contract, limit their liability and exempt themselves from responsibility for loss or damage unless caused by their own fraud or gross neglect. (*Merc. Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Dorr v. N. J. Steam Nav. Co.*, 4 Sand., 136; 1 Kern., 485; *Holford v. Adams*, 2 Duer, 471; *Newstadt v. Adams*, 5 id., 43; *Wells v. Steam Nav. Co.*, 4 Seld., 381; *Moore v. Evans*, 14 Barb., 524; *Parsons v. Monteath*, 13 id., 353.)

II. So may carriers of passengers. (*Welles v. N. Y. Cent. R. R. Co.*, 26 Barb., 641.)

III. The answer alleges that the injuries were not caused by fraudulent, willful or reckless act or misconduct or gross neglect. The demurrer admits this.

IV. From all other negligence the contract exempts the defendants.

V. The defendants could exempt themselves from liability for any negligence of its servants, provided due diligence was exercised in the selection of such servants. (*Wells v. Steam Nav. Co.*, 4 Seld., 381; *Welles v. N. Y. Cent. R. R. Co.*, 26 Barb., 641.)

George Stevenson, for plaintiff, (respondent.)

I. Passage tickets are mere tokens, not contracts. (*Quimby v. Vanderbilt*, 17 N. Y. R., 306.)

II. Accepting or using such a pass cannot be construed into an assent to the terms printed thereon. The deceased was entitled to the full protection of the law of carriers though he paid no

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fare otherwise than by paying for his stock. (*Phil. and Read. R. R. Co. v. Derby*, 14 How. U. S. R., 468.)

III. If the deceased did assent, the terms "any cause whatever," do not embrace the negligence of the carrier. (*Wells v. The Steam Nav. Co.*, 4 Seld., 375; *Alexander v. Green*, 7 Hill, 544.)

IV. In the part of the answer demurred to an issue is attempted to be made on the question of gross negligence. Actual negligence is therefore admitted, and in a case like this any negligence is gross. (1 Parsons on Contracts, 694, note.)

BY THE COURT—HOFFMAN, J. It is insisted by the counsel of the plaintiff, that the Court is at liberty to interpret the contract between the defendants and the plaintiff's intestate by the attending circumstances, and to restrict the general language to cases which would still leave the defendants liable for some neglect.

Adopting this view, this at least is clear, that the plaintiff must show plainly that the intention of the parties was to qualify and restrain the very comprehensive language used in the instrument.

So far from its being obvious that there are cases other than those of negligence, which the parties may be reasonably supposed to have contemplated, it seems to us difficult to understand in what cases the Company could be rendered liable at all for injury to the person of the party, without some negligence on their part or on the part of their agents. An injury to his person, in the course of his being carried to New York in their cars, could have arisen either from his own negligence, without any fault of the defendants; or from an event wholly independent of fault of either party; or from some neglect or fault on the part of the defendants.

The parties cannot be intended to have contemplated the exemption of the defendants in the first two cases. The natural interpretation is, that they meant to cover the last case.

The counsel of the defendants does not deny that there may be a degree of gross neglect, amounting to willful and fraudulent misconduct, for which they might be responsible, even under this contract. His answer is framed to negative such a case.

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It may be difficult or impracticable, as observed, in *Welles v. The New York Central R. R. Co.*, (26 Barb., 646,) to distinguish accurately between the different degrees of negligence. Yet one case can certainly be readily supposed in which a marked and practical distinction would exist. There might be a case of such misconduct on the part of an agent as would indicate a willful design to injure the party, a desperate recklessness which wantonly endangered the lives or property of all those who are in his charge, a case of personal misconduct, and yet the principal be responsible. In *Weed v. The Panama Railroad Company*, (5 Duer, 193, and 17 N. Y. R., 862,) the willful act of the conductor who managed the train was not allowed to be a ground of exemption for the Company.

But the averments of the answer seem to us to cover all such cases by denying that the injuries were caused by any fraudulent, willful or reckless act or misconduct, or gross neglect, or default; and the terms and import of the stipulation appear to amount to an agreement that the party was to have no redress for injuries arising from other degrees or cases of negligence.

We consider, also, that the parties were fully at liberty to enter into a contract of this nature. (1 Kern., 485.)

We think that the Court below erred, and that the order must be reversed, and the demurrer overruled.

Order reversed and demurrer overruled, with leave to withdraw demurrer, &c., on the usual terms.

BENAJAH LEFFINGWELL, Receiver, &c., v. WILLIAM G. CHAVE and Wife.

1. The provision of section 220 of the Code requiring that on the service of an injunction a copy of the affidavit on which it is granted be served therewith, is satisfied by the service of copies of whatever papers were laid before the Judge, and on which he ordered the injunction whether the allowance was upon a summons and a complaint duly verified or upon affidavits commonly so called.

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2. An injunction order may be allowed and signed by the Judge, and be delivered to the officer before the service of the summons upon the defendant; but the service of the order upon the defendant before the summons is served, is irregular and is ineffectual. (Code, §§ 220 and 99.)
3. An undertaking duly approved by the Judge, procured or furnished by the plaintiff or his attorney for the security of the defendant, and executed by any persons possessing the requisite qualifications, agreeing that the plaintiff shall pay to the defendant the damages he may sustain, is an undertaking "on the part of the plaintiff" within the meaning of section 222 of the Code, requiring security on granting an injunction. It is not necessary that it should be executed by the plaintiff or his agent or attorney.
4. Such undertaking must be given in form absolute and binding either the plaintiff, or some one or more who undertake for him, absolutely for the payment of such damages; and it may, if the Judge require sureties, also bind others as sureties in form and in terms as sureties. There should be a principal and the Judge may require sureties; but such principal may be one who undertakes on behalf or for the plaintiff, without the latter being a party to the instrument.
5. The neglect to file the papers upon which an injunction is granted, within the time prescribed by the rules of Court, may be excused, and it does not render the service of the injunction a nullity or require that it be set aside.
(Before WOODRUFF, J.)

At Special Term; Heard and decided, April, 1860.

UPON the summons and complaint in this action with the usual affidavit of verification, and upon an undertaking executed by two persons, neither of whom is the plaintiff, an injunction order was granted by a Justice of this Court before the summons had been served on the defendants, and the injunction order was served with the summons and complaint upon each of the defendants. The summons and complaint upon which the injunction order was granted had not been filed when the notice of the motion was served.

The defendants move to vacate the order of injunction or dissolve the injunction, or set aside the service thereof, &c., on various grounds, viz., that the affidavits upon which the injunction was granted, were not served therewith; that the injunction was granted and signed by the Justice before the action was commenced (*i. e.*, before the actual service of the summons on either of the defendants); that the undertaking was not executed by the plaintiff nor by any person on his behalf, but by sureties only; and that the papers upon which the injunction was granted

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were not filed within five days as required by the rules of Court. (Rule 4.)

The plaintiff showed that after receiving notice of this motion he filed the papers, it having been omitted theretofore through inadvertence.

Bliss & Barlow, for defendant, in support of the motion cited in support of the aforesaid grounds thereof:

1st, Code, § 220 ; 8 How. Pr. R., 87 ; 9 id., 426.

2d, Code, §§ 99 and 220 ; 5 Duer, 118.

3d, Code, § 222 ; 1 Duer, 666 ; 4 S. & M., 683.

4th, Court Rule No. 4 ; Code, § 470 ; *O'Donnell v. McMunn*, 3 Abb., 391.

Charles E. Jenkins, for plaintiff.

WOODRUFF, J. The objection that the affidavits upon which the injunction was granted were not served is not insisted upon. The plaintiff's affidavit shows that no other affidavit than the complaint duly verified was presented to the Justice for the purpose of obtaining an injunction ; this is sufficient for that purpose. By the plain terms of section 219, a temporary injunction may be granted, when it "appears by the complaint" that a case exists in the plaintiff's favor entitling him to have the defendant restrained. Whether under the language of section 220 requiring that "a copy of the affidavit" be served with the injunction, the complaint and verification are to be regarded as "an affidavit" as sometimes held, or the requirement of section 220 in this respect be held to relate only to cases in which the injunction is obtained upon affidavit (strictly so called) after the suit has been commenced. In either view it is sufficient to serve with the injunction the complaint and verification upon which it was granted.

The next objection denies the jurisdiction of the Justice to grant an injunction order before the actual service of the summons.

The language of the 220th section is, "the injunction may be granted at the time of commencing the action, or at any time afterward before judgment," &c. ; and section 99 declares that

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"an action is commenced as to each defendant when the summons is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him;" and section 127, "that civil actions in the Courts of record in this State shall be commenced by the service of a summons."

Under these provisions it is plain, I think, that an injunction order cannot become operative until the summons in the action has been served; and that the service of an injunction upon the defendant, prior to the service of the summons, would be irregular and ineffectual.

It does not follow, that the injunction order may not be signed by the Justice preparatory to such service and be delivered by the Justice to be served with the summons, although until the summons is served it has no effective operation.

The language, the injunction may be granted "at the time of commencing the action or at any time afterwards" was meant to define two periods. If the summons must in all cases be served before the Justice has jurisdiction to grant the order, then no injunction can issue until after the action has been commenced, and the words "at the time of commencing the action" are without meaning and superfluous; but the Code means that a plaintiff may not only have an injunction after his action is commenced, but that he may have it at that prior time described by the words "at the time of commencing" his action. And in this connection, those words mean while the work of commencing the action is going on and not after it is finished.

It imports that the injunction may be obtained so that it shall operate at the time when and so soon as the action is commenced, and not alone after it is commenced.

This accords with good sense. It meets a very large class of cases in which it is of vital importance to a plaintiff to enjoin the defendant at the very instant he is apprised that an action is commenced, and in which the defendant would, but for such injunction, defeat the very object of the suit.

The section which declares that the Court is deemed to have acquired jurisdiction in a civil action from the time of the allowance of a provisional remedy (§ 139) is in harmony with this construction, and sustains it.

The objection that the undertaking was not signed by the plaintiff or his agent, or by some person who in very terms is described on the face of the undertaking as acting "on the part of the plaintiff," raises a question in regard to which there has been some conflict of opinion.

The language of the 222d section is, that "the Court or Judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages," &c.

In my opinion the just meaning of this language is satisfied, and all the proposed benefits to the defendant are secured by construing the words "on the part of the plaintiff," as simply words of contrast or opposition to the part of his adversary. And that an approved undertaking, executed by any persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, if it be procured and furnished by the plaintiff or his attorney for the security of the defendant, is an undertaking on the part of the plaintiff within the meaning of this section.

If this be not so, then on the part of the plaintiff can only mean "executed by the plaintiff." No other person can execute it who would not be (as between him and the plaintiff) a mere surety.

It is suggested that his agent or attorney may execute the undertaking. No doubt he may, but if he executes it by the plaintiff's authority then it is in law the plaintiff's undertaking and not his own; if he have no such authority, then he executes it just as any other person would execute it, binding himself and not the plaintiff, and he is just as much a surety as any other person would be.

Suits are often necessary when a plaintiff is out of the State, or sick, or under disability, or an infant, or otherwise incompetent or unable to execute an undertaking, or to authorize any agent or attorney to do so. I cannot concede that it was intended that in such case no injunction should be issued.

The words "by the plaintiff, with or without sureties," had they been used, would be plain and would require the plaintiff to execute, but the words "on the part of the plaintiff, with or without sureties," are fully satisfied if any person or persons in aid of the prosecution, acting in furtherance of the action, at the

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instance of the plaintiff, will peremptorily and unqualifiedly undertake that the plaintiff shall pay to the defendant the damages which he may sustain.

The terms "with or without sureties" would seem to indicate that whoever gives the absolute undertaking, whether it be the plaintiff himself or some person or persons whom he or his attorney may procure, there may still be sureties if the Judge so require. The forms of undertaking now in common use make all the undertakers in form and in fact principals as between them and the defendant; and in that sense they are absolute undertakings on the part of the plaintiff and not undertakings with sureties, and such is the undertaking in this case.

It is only in accordance with the language of the section under consideration to say that an absolute undertaking that the plaintiff will pay (whether executed by him or by other persons) is an undertaking on the part of the plaintiff, and the Court or Judge may receive it, if satisfactory, or he may require the security of others who shall execute in very terms as "*sureties*."

That those who sign as sureties may so express their obligation is plain. Oftentimes they will prefer to do so. And the utmost that can be claimed by a defendant (if so much even be conceded) is, that there shall be a principal in the undertaking in form; and whom he can treat as principal without the necessity of demand or notice, and if the responsibility of such principal be inadequate then that he may have sureties. This construction would harmonize with the claim that in using the terms "with or without sureties," the Legislature necessarily imply that there must be a principal, since otherwise there is no surety.

If a defendant bring his action on an undertaking in the form in common use, in which the undertaking is absolute, he will be the first to say, "As between me and yourselves you are principals and not sureties." If so, then he has an undertaking given on the part of the plaintiff strictly without sureties.

Nor is it doubtful, I think, that an undertaking in the form "I undertake and promise," &c., executed by one person, with a further agreement in due form by another person by which he became bound as surety, would be a compliance with the statute in its terms as well as its meaning, although the plaintiff signed neither.

Indeed if that form of undertaking had been introduced into use, I greatly doubt that this question would have ever arisen.

But as undertakings are, in general, in form absolute, binding all the signers as principals, it has happened that they have been called sureties and somebody is sought for to be principal in the terms "on the part of the plaintiff."

I repeat that an approved absolute undertaking that the plaintiff will pay, &c., is enough, whether it be executed with sureties or without sureties, and such an undertaking has been given here.

I am aware that there has been on this point also a difference of opinion, the late Chief Justice DUER, in *Richardson v. Craig*, (1 Duer, 666,) held that similar words in the section (182) prescribing the undertaking to be given on obtaining an order of arrest made it necessary that the plaintiff should sign the undertaking. But he was compelled to make his own construction yield when the plaintiff was an infant, &c. In *Sief v. Shausenburgh*, (Sept. 22, 1858,) I am told that Chief Justice BOSWORTH held an absolute undertaking sufficient to justify an order of arrest, though neither signed by the plaintiff nor by any one professing to be his agent. (*Askins v. Hearn*s, 3 Abb., 184; *Bellinger v. Gardiner*, 12 How. Pr. R., 381.)

The last objection to the plaintiff's proceedings is that he has not filed the papers upon which the injunction was granted as required by the 4th of the Rules of Court. When the notice of this motion was given the fact so stated was true and the defendant had a right to his motion and the Court might vacate the injunction order upon that ground. But it appears by the affidavit on behalf of the plaintiff that the omission to file the papers was an inadvertence, and so soon as the notice of motion was received the papers were filed. Under such circumstances the Court have a discretion to relieve the plaintiff from the consequences of his omission, but as the defendants' motion is regular such relief should be granted upon terms. Indeed, if the plaintiff had at once given notice of the filing and sought a waiver of the motion, I would have allowed no costs to the defendant if he persisted in his motion.

All the other grounds of motion must be overruled, but upon this last point the motion must be granted unless the plaintiff pays the costs of motion, \$7. If he pay those costs within five days the motion is denied.

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JAMES H. HILLIKER, Receiver, Plaintiff, v. GEORGE C.
HATHORNE, JR., *et al.*

1. Where by a judgment or decree a defendant is required to execute an assignment or conveyance to the plaintiff, and an instrument in proper form is tendered to him, he is bound to execute it, although it has not been submitted to the Court or Judge for approval.
2. It is, however, proper that such a judgment should provide for the settlement of the form of the instrument by a Judge or Referee, and if the defendant is in doubt respecting the propriety of the form of the instrument proposed, he should apply to the Court to have it settled.
3. On a motion to punish a defendant for a contempt in not executing the assignment tendered, where the judgment did not provide any mode of settling the form thereof, it appeared that the defendant acted in good faith, under the advice of counsel deeming him not bound to sign the instrument in the form tendered; the motion was discharged without costs, on the defendant's executing the instrument.
4. In an action by a Receiver, on behalf of a judgment creditor to set aside an assignment of a lease, the Court, on the 27th of March, announced its decision that the assignment was void; that the plaintiff is entitled to an assignment thereof as Receiver, and to the rents thereafter to accrue from the tenants in possession. On the 1st of April, one of the defendants, who had heard, in general terms, that the case had been decided in the plaintiff's favor, but had no knowledge of the particulars, or that the plaintiff was by such decision entitled to the rents due that day, collected such rents. On the 9th of April, a judgment was entered in conformity with the decision, and was made to bear date of the day the decision was announced. The defendant was not under any injunction in the action, and the decision did not direct an injunction. Upon these facts, a motion to punish the defendant for collecting those rents, as for a contempt, was denied.

(Before WOODRUFF, J.)

At Special Term; May 5th, 1860.

IN this case certain judgment creditors of the defendant Hathorne, caused him to be examined before a Judge of the Supreme Court on proceedings supplementary to execution issued on a judgment recovered in that Court, procured an injunction from a Judge of that Court, to restrain him from disposing of or interfering with his property, and the plaintiff herein was appointed Receiver of his property. The plaintiff, as Receiver, brought an

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action in this Court to set aside an assignment of a lease executed and delivered by Hathorne to the other defendants as fraudulent and void as against the judgment creditors. A judgment was rendered declaring the assignment void, and directing the defendants to assign the lease to the plaintiff as Receiver, and directing the tenants in possession of the premises "to pay over the rents hereafter to accrue to the plaintiff, as such Receiver, and that he collect a sufficient amount to satisfy the judgment and execution aforesaid with costs," &c. The decision of the Court was publicly announced and noted in the minutes on the 27th day of March, 1860. But the judgment was not drawn up and entered until April 9th, 1860. After which the plaintiff's attorney drew an assignment and tendered it to the defendant, Hathorne, for execution, and served on him a copy of the judgment. He declined; his counsel advising him that he was not bound to sign the instrument tendered to him, and that the form of the instrument must first be settled by the Court, or under its order, before he should sign it.

Rents became due from the tenants of the demised premises on the 1st day of April, (after the Judge had announced his decision,) and the defendant, Hathorne, after he had heard in general terms that the case was decided in the plaintiff's favor, but before the judgment was entered, collected such rents or a portion thereof.

The plaintiff then moved for an attachment to punish the defendant, Hathorne, for a contempt in refusing to execute the assignment and also in collecting such rents.

His excuse was, that the form of the instrument of assignment had not been settled or approved by the Court or a Judge thereof and the advice of his counsel.

And in relation to the collection of the rents, he swore that he was not aware that by the decision of the Court the plaintiff was entitled to the rents which had already become due; that the rent which he had collected had become payable before he had received any notice of the terms of the judgment and before the judgment itself was entered, which declared the plaintiff to be entitled to the rents hereafter to accrue.

The judgment when entered, viz., on the 9th April, 1861, was made to bear date March 27th, the day the decision was

Hilliker, Receiver, v. Hathorne *et al.*

announced. It contained no terms of injunction restraining the defendants.

Nelson Smith, for plaintiff, in support of the motion.

1. Refusal to execute the assignment was a contempt.
2. Collection of rents after notice that the case was decided in favor of the plaintiff, was a contempt although the decree had not been entered or served. (*Skip v. Harwood*, 3 Atk., 564; *Kemp-ton v. Eve*, 2 Ves. & Beames, 349; *Hull v. Thomas*, 3 Edw. Ch. R., 236; *People v. Compton*, 1 Duer, 515, 553.)

Although the decree contains no prohibition restraining Hathorne from collecting the rents, it does declare the plaintiff entitled thereto, and adjudges their payment to him as Receiver. It was, therefore, a contempt on his part, and impeded the plaintiff in the assertion of his rights under the decree tending to defeat the decree, and render it ineffectual. (5 Vin. Abr., 446; *Sir James Buller's Case*, 2 Salk., 596.)

Otis D. Swan, for defendant.

WOODRUFF, J. In this case the decree ought to have provided some mode in which, if counsel differed as to the form of the assignment to be executed by the defendants, their difference could be settled by laying before a Justice of this Court the proposed assignment and the objections thereto, that the form might be settled by him. But, in the absence of such a provision, the plaintiff had a right to require the execution of an assignment; and, if the one tendered by him was a proper one, the defendants, under the advice of their counsel, should have executed it, or should have procured and executed some other in proper form, or, if he was in doubt, should have applied to the Court on his own behalf to have the form settled. Nevertheless, if, as appears on this motion, the form of assignment had not been approved by the Court, and the defendants' counsel advised that it was not drawn in proper form, the defendants should have an opportunity to execute the assignment, and, upon doing so, this motion should be deemed discharged.

As to the moneys collected from the tenants in possession of the demised premises, although I think the conduct of the defend-

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ant Hathorne is by no means free from fault, and that the plaintiff has a clear right to collect them, either from him, or, it may be, from the tenant, a case for an attachment is not made out so as to warrant that mode of compelling the defendants to pay over the money.

If fraudulently collected, possibly the defendant may be arrested. If he violated an injunction of the Supreme Court, or a Justice thereof, that Court, or Justice, has power to punish for that. But it would be carrying the idea of contempt of the orders of this Court further than I am now prepared to do, if I should hold that oral notice that the suit was decided in the plaintiff's favor, without notice of the particulars of the decision, when the defendant is not under an injunction, and no injunction was ordered by the decision, subjected the defendant to process of contempt when no order or decree had been drawn up or entered, in the face of the defendant's express denial that he had any notice that the decision entitled the plaintiff to the rents which he collected.

The defendant Hathorne may have five days within which to execute the assignment proposed by the plaintiff; and if, within that time, he execute and duly acknowledge it, the motion shall be discharged, without costs. In default of such execution, a precept may issue against him, to commit him until he execute such assignment and pay (in that event) \$10 costs of motion and the fees of the Sheriff, &c.

• Ordered accordingly.

WILLIAM PALEN v. SAMUEL E. LENT and CATHARINE, his Wife.

1. A cause of action against a husband, entitling the plaintiff to a recovery of money from him, cannot be joined with a claim to charge the separate estate of the wife with the payment of the amount sought to be recovered.
2. A promissory note, signed by the wife and delivered by the husband, for the purchase of property used and enjoyed in a business carried on for their joint benefit, does not operate both as a note of the husband making him per-

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sonally liable and as an appointment by the wife of her separate estate or as a charge thereon.

3. A complaint which seeks to charge the separate estate of a married woman upon her promise must show that the consideration of the promise was some benefit to her separate estate, or that there was a distinct intention on her part to charge her separate estate.

(Before ROBERTSON, J.)

At Special Term; May 14th, 1860.

Demurrer to the complaint. The pleadings, so far as it is material to state them to show the points decided herein, are set forth in the opinion of the Court.

ROBERTSON, J. The defendants are husband and wife; the complaint alleges the making of a note signed by the wife payable to and indorsed by a Mr. Brown to the plaintiff, and the possession of separate estate by the defendant, Mrs. Lent. It also alleges that the note was given for the purchase of a pair of horses, owned and enjoyed by the defendants; that Mrs. Lent carried on a livery stable in her own name and for her own benefit; that her husband acted conjointly with her or as her attorney, or was interested in the business of such livery stable and as such attorney, or otherwise assented to the making of such note, to derive some benefit therefrom. It prays judgment against both defendants and also against the separate property of Mrs. Lent.

This pleading joins a liability of the wife's separate estate with that of the husband which is one of the causes of demurrer. The Code (§ 167) permits causes of action to be united, whether legal or equitable, provided they arise out of the same transaction, or transactions relating to the same subject matter, or originate in contract, but they are required to be separately stated, but in this case they are not separately stated; on the contrary, it appears that the cause of action is but one only, the liability is separate. It is clear the complaint does not set out a joint contract, nor does it set out a separate one by both defendants, supposing the appointment of the separate estate of the wife to be a contract, which is very doubtful. The defendants must therefore, if liable at all upon the same transaction, be liable as principal and surety, actions against whom

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it has been held cannot be joined. (*Brewster v. Silence*, 4 Seld., 214; *Phalen v. Dingee*, 4. E. D. Smith, 379.) The complaint also fails to make out a cause of action against both defendants, because it seeks to make both responsible upon an instrument signed only once, by one; clearly the note cannot operate as a note of the husband making him personally liable, and an appointment by the wife of her personal estate. The facts that both parties were interested in the same livery stable conducted in the wife's name and for her benefit, and that the note was given for a pair of horses is not sufficient; if a husband and wife could enter into a contract of copartnership and it was alleged they did so in this case, those facts might make them jointly liable but not severally. If the note in question had been, however, merely the joint note of both, the wife's separate estate would not have been liable. (*Yale v. Dederer*, 18 N. Y. R., 265.)

As regards the cause of action set out against the wife, the complaint is defective in not alleging either that the consideration of her promise was for the benefit of her separate estate, or that of which it is the evidence, to wit, that she intended by the note to charge such estate, which is always necessary to be established, either by the words of the writing or proof *aliunde*. (Story Eq. Jur., 1400; *Vanderheyden v. Mallory*, 1 Comst., 462; *Yale v. Dederer*, *ubi sup.*; *Curtis v. Engel*, 2 Sandf. Ch. R., 288.) The facts that the note was given for a pair of horses, and that the defendant Mrs. Lent was carrying on a livery stable for her own use, may be important links in evidence to show such intent, but their averment is not equivalent to that of the latter.

The failure of the complaint to set out the particulars of the defendant's separate estate may not be available on demurrer or in any other way than by motion to make definite. The mere joinder of the defendant, Lent, too, as a party is probably not objectionable. (*Draper v. Heningsen*, 16 How. Pr. R., 284.) but the other defects are sufficient to make the demurrer of both parties well taken.

The demurrer must therefore be sustained and judgment given for the defendants, with costs, unless the plaintiff amend within twenty days. The costs to be one bill in favor of either defendant, as they or their counsel may elect.

Lichte *et al.* v. The Everett Fire Insurance Co.

**FERDINAND C. LIGHTE and others v. THE EVERETT FIRE
INSURANCE COMPANY.**

1. It is not necessary that a corporation, plaintiffs, should in the complaint allege that the plaintiffs are a corporation.
2. Nor is it necessary, in declaring against a corporation, to allege that the defendants are a corporation.

(Before ROBERTSON, J.)

At Special Term; May 26th, 1860.

Demurrer to the complaint. The opinion of the Court sufficiently states the complaint and the grounds of demurrer.

ROBERTSON, J. The objection in this case is that the complaint has not alleged the defendants to be a corporation or Joint Stock Company. It has long been settled that plaintiffs need not aver themselves to be a corporation. (*Bank of United States v. Haskins*, 1 J. C., 132; *Bank of Utica v. Smalley*, 2 Cow., 770; *Holyoke Bank v. Haskins*, 4 Sandf. S. C. R., 675; *Union Mutual Ins. Co. v. Osgood*, 1 Duer, 708; *Bank of Waterville v. Beltser*, 13 How. Pr. R., 270.) Before the passage of the Revised Statutes it was held that the plea of the general issue put in issue the existence of the plaintiffs as a corporation as though it were averred, and it could only have been upon the principle laid down in the above case of *Union Mutual Insurance Company v. Osgood*, that the name being an appropriate name for a corporation, the very name imported an averment to the same effect. The Revised Statutes merely require the defendants to make it a special issue. (2 R. S., 458, § 3.) It would be difficult to see why the same reasoning should not apply to the defendants. If the law takes notice of the character of the name, it must equally do so in the other. It is as important to show a personality to be contracted with as one to contract.

Another difficulty arises from the fact that the Code only permits specific causes of demurrer, and the objection in question does not come within any of them. The question whether the defendants are a corporation, is no part of the cause of action. They are either a corporation or an association, or have no existence;

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if the last, of course no judgment can be of any avail; if they are persons using a corporate name, and the plaintiff makes a mistake in suing them as a corporation, they are at liberty to plead that they are not what they have seemed, but it must be by an answer.

If the question were a new one in regard to plaintiffs, I might perhaps entertain a different view; but it being established that a name carries with it the assertion of a fact, I can see no reason for not applying the same rule to defendants.

The demurrer must, therefore, be overruled, with costs, and judgment be given for the plaintiffs, with liberty to the defendants to answer in twenty days, upon payment of costs, upon filing affidavit of merits and of good faith in putting in the demurrer, in five days.

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under a written agreement signed by the vendors and vendees, and such agreement is, in form and terms, that the vendors and vendees "constitute and appoint B. and W. to appraise" the property, and "bind themselves each to the other to abide by their valuation of the same, at which" (the vendors) "agree to sell the same to" the vendees, and the latter "agree to buy the same" of the vendors; and in case B. and W. "should be unable to agree in their valuation, they shall select a disinterested party, as usual in such cases, to assist them in the appraisement;" and where B. and W., being unable to agree, selected a third person, and the three met together and examined the property, and two of them agreed upon a valuation, the vendors are entitled to recover the sum so agreed upon, although such third person was selected upon an agreement between him and B. and W. that he should fix the value and they would concur in it, provided that agreement was abandoned, and the three did in fact meet and examine the property together, with a view to determine its fair value, and the value so agreed upon was fixed in good faith, and expressed the honest judgment of the two who concurred in respect to it. *Haff v. Blossom et al.*,559

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property of such consignor, issued under the Code, and served by delivering a certified copy of it to such factor on the 6th of April, 1854, will attach and bind such surplus, and such attaching creditor will hold it in preference to, and to the exclusion of, another creditor of such consignor, who obtains an attachment against the latter and serves it in like manner on the 15th of June, 1854. *Patterson v. Perry et al.*,518
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B

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1. The drawing of a check on a Bank by one who keeps an account in it, and has, at the time, moneys to the same or a larger amount to his credit on its books, and a delivery of

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2. In an action by the payee of a check against the drawer, it is no defense that it was given by the defendant for a debt owing by a third person to one who was the payee's principal; and that the payee accepted it as agent for the debt due to his principal, the payee being expressly authorized to settle such debt and receive payment of it. *Fish v. Jacobsen*,514

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2. Although, by making such a transfer of it, the Bank may be charged by the remitter for its amount, still he is at liberty to pursue it and recover its proceeds from any one to whom it has been paid, and to whom it was transferred by such Bank as mere security for a precedent debt. *id*
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of Commissioners," &c., and the plan is subsequently, without the consent of the obligors, so changed that a gore of land at the part of Canal street, bounded by Centre, Walker and Baxter streets, instead of being taken and converted into a park, as the original plan contemplated, is not taken, but is left to be built upon, and Canal street is extended an additional distance, and the work is completed according to the modified plan, such obligors are not liable upon said bond. *Giles v. Crosby et al.*, 389

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3. Where a broker is instructed to purchase, as such broker, for the plaintiff, a specified number of shares of the stock of a corporation named, and he accordingly contracts to buy the specified number and receives a certificate of stock regular in form and issued by the proper officer of the corporation for the specified number of shares, receives payment therefor from his principal and makes payment to his vendor, and such certificate proves to be valueless and not to represent actual stock, such broker, where he has acted in good faith and according to the customary course of business among brokers in such cases, is not liable to his employer for any damage resulting to him from such transaction and purchase. *Peckham v. Kelchum et al.*,506

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1. Rule of damages where property is lost or injured on the route of carriers over only a portion of the intended journey. *Harris v. Panama R. R. Co.*, 312

2. A party doing business under the name and style of "Spaulding's Express Freight Line," and in that name receiving goods at New York "to be forwarded by Spaulding's Express to" Louisville, without liability for damage, "if delivered at Louisville depot in good order," without liability "for wrong delivery of goods marked by initials," or "for wrong carriage of goods that are imperfectly marked," and, in case of loss or damage for which Spaulding's Express

may be liable, stipulating that the latter shall have the benefit of any insurance effected by the owner, is a carrier of goods and not a forwarder merely, notwithstanding he employs the conveyances of third parties only, (Railroad Companies, &c.,) in the performance of his contract. *Read et al. v. Spaulding*, 395

3. Where goods in a railroad depot near a river were injured by an extraordinary flood, rising higher than any flood had ever risen before, which it was no negligence not to anticipate and from which, when the rise of the water became apparent, the goods could not be delivered, if the carrier in the due discharge of his duty had the goods in the regular and usual course of transportation so that their being in the depot at the time was proper, the injury is by the act of God in such sense that the carrier is excused. *id*

4. But it is the duty of the carrier to carry and deliver within a reasonable time, and if, when the goods were in the depot and the flood came, he had violated his duty and was under the actual pressure of fault and neglect, without which the goods would have been safe, he is not excused. *id*

5. A carrier is liable for injury to goods caused by inevitable accident, or what is termed the act of God, if, by his culpable negligence or unexcused and unreasonable delay in the transportation, he unnecessarily exposes the goods to the peril. *id*

6. When goods were purchased in Connecticut by persons doing business at Liverpool, England, to be delivered by the vendor on ship board in New York, and were so delivered on board the defendant's ship, then bound for Liverpool, and were received by the defendants for transportation to Liverpool, and a receipt given therefor specifying the price of freight; but before bills of lading were delivered or executed,

and before the ship sailed, she was destroyed by an accidental fire at the wharf without any actual negligence of the defendants, and the goods were burned: *Held*, that the defendants were liable as common carriers for the loss of the goods. *Lakeman et al. v. Grinnell et al.*,.....625

7. The measure of damages where goods are lost before the ship of the carrier leaves the port of lading, is the value of the goods at that port, and the plaintiff is not entitled to the value at the port of destination less the cost of transportation....*id*

8. Where goods intrusted to a common carrier for carriage, are lost by accident without any actual negligence on his part, the plaintiff is not entitled to recover interest on the value of the goods, not even from the time of the commencement of suit.*id*

9. To an action for an injury to the person, sustained by one who was riding in a car of a Railroad Company, through the alleged negligence of the servants of the Company, it is a good defense that the person injured was at the time riding by virtue of a special contract which was evidenced by a pass or free ticket accepted and used by him to enable him to take charge and care of his live stock while on the railroad, and as part of the contract for transporting such stock, which contained an express stipulation that "by accepting or using it he expressly releases the Company, in consideration of this pass and the reduction of price below the tariff rates, from all liability for injury to said stock from suffocation, crowding, trampling, or delay in transportation, or for injury to his person or stock arising from any cause whatsoever," the answer also averring that the injury to the person was not caused by any fraudulent, willful or reckless act or misconduct or gross neglect. *Boswell, Adm'r, v. The Hudson River R. R. Co.*,...699

10. A Railroad Company may limit their common law liability as carriers of passengers, by express contract with the passenger upon sufficient consideration, so as not to be liable for casualties not arising from fraud, willfulness, recklessness, or gross neglect.....*id*

COMPROMISE.

Vide DEBTOR AND CREDITOR.

CONSIGNOR AND CONSIGNEE.

Vide ATTACHMENT, 2, 3, 4.

CONTEMPT.

Vide PRACTICE, *title* CONTEMPT.

CONTRACT.

1. A person who receives from one party to an illegal contract, money paid in execution and satisfaction of it to the use of the other party to such contract, on a promise to pay it over to such other party, cannot defend an action brought by the latter to recover such money, on the ground of such prior illegal contract, where the person receiving such money and making such promise in no way participated in or was a party to it, and did not know of it when he received such money and made such promise. *Merritt v. Millard*,645

Vide ACTION, 1, 2.
AGENT, 1, 2.
AGREEMENT.

CONVERSION.

1. One who sells stock without the authority of the owner, but on the employment of a thief or tortious possessor of the certificate, is liable

to the owner as for a conversion.
Anderson v. Nicholas,... 121

2. How far a qualified refusal to deliver on demand is to be taken as evidence of conversion considered.
Thomson v. Sixpenny Savings Bank,.....293

CONVEYANCE.

C, an owner of land, conveyed it by a deed, absolute on its face, to W, and W at the same time executed and delivered to C a written defeasance which made the deed, as between the parties to it, a mortgage; the deed was recorded as a deed, and the defeasance was not recorded. W subsequently conveyed in fee to the plaintiff, who paid the agreed price, and recorded his deed, without having any notice of the defeasance.

1. *Held*, that the plaintiff, having bought in actual good faith, acquired a title perfect as against C, and as against the defendant, C's remote grantee under deeds subsequent to the plaintiff's deed, notwithstanding the defendant took his deed and paid the consideration without actual notice of the deed from W to the plaintiff, or of the defeasance. *Stoddard v. Rotton*,.....378
2. That 1 Revised Statutes, (p. 756, § 3,) which is to the effect that a grantee in a deed intended as a mortgage, unless he records it as a mortgage, and also records therewith and at the same time the writing operating as a defeasance of the same, shall not derive any advantage from the recording thereof, cannot be construed as operating to defeat the title which the plaintiff thus acquired from W,*id*
3. *Held*, also, that the defendant could not be treated as a mortgagee in possession, by force of the deed from his immediate grantor, although such grantor, subsequent to receiving a

deed from C, and before conveying to the defendant, had a mortgage assigned to him which was a lien on the premises when C conveyed to W, and remained partly unpaid; that such mortgage was extinguished by the conveyance with warranty to the defendant, as between the latter and his immediate grantor.....*id*

4. The Referee having treated the defendant as a mortgagee in possession under said mortgage, and having decided that the plaintiff pay to the defendant the amount found due thereon, as a condition of recovering possession: *Held*, on an appeal taken by the defendant, that there was no error to the prejudice of the latter, and that the judgment be affirmed. *id*

5. In an action on the covenant of seizin, if the defendant allege seizin in his answer, he has the affirmative of the issue and the burden of proof. *Potter v. Kitchen*,566

CORPORATION.

1. Can the maker of a note avoid its payment or impeach the title of a holder, by proof that such holder received it from a corporation upon a usurious contract? *Quare. Scott et al. v. Johnson*,213
2. Where a manufacturing Company was incorporated "for the purpose of carrying on the business of cutting, sawing and dressing stone of all kinds, and the business of stone cutting in all its branches," and its by-laws provide that the Secretary, "in the prosecution of the business, may make, draw, indorse and accept notes and bills of exchange," such Secretary has no authority to accept a bill for the accommodation of the drawer, drawn and used to raise money for the use of the latter. *The Farmers' and Mechanics' Bank v. The Empire Stone Dressing Company*,275

3. Nor has the President or Trustee or Manager of its affairs, any such authority by mere virtue of his office or agency.*id*

4. The Company is not liable, upon such an accommodation bill, so drawn and accepted by the Secretary, by direction of such President or Manager, to a holder who discounted the same for the drawer before it was accepted, notwithstanding he received the bill in good faith, and paid value therefor in the expectation that it would be accepted, and in ignorance of the fact that it was drawn for the accommodation of the drawer and that the Company had no funds of the drawer.*id*

A corporation was created for the purpose of receiving on deposit sums offered therefor by mariners, tradesmen, clerks, mechanics, laborers, minors, servants and others, and investing the same in State or city stocks or bonds, or loaning the same on such securities, or on bond and mortgage on real estate, for the use and advantage of the depositors; the business of the corporation to be managed by a Board of Trustees, who were authorized to appoint a President and two Vice-Presidents; and power was given to hold only such real estate as was necessary for the transaction of its business, and such as should be purchased at sales upon judgments or decrees obtained for money so loaned, and the corporation was prohibited dealing in or buying or selling any goods, wares or merchandise. The by-laws provided for monthly meetings of the Trustees, and conferred the superintendence and management upon seven Trustees during the interval. Upon the foreclosure of a mortgage, held by such corporation, upon a manufactory, and a sale of the mortgaged premises, the corporation became the purchaser. Thereafter, and after the corporation had taken possession, one of the Vice-Presidents, without the authority of the Trustees, forbade the

removal of certain tools and machinery therefrom by the purchaser thereof under a sale by virtue of a mortgage upon such tools and machinery, alleging that, as to any of the articles which were fixtures, they were the property of the corporation, and declining to specify which he claimed to be fixtures, until consultation could be had for the purpose of ascertaining which were in law fixtures passing to the corporation under the first named foreclosure sale.

5. Held: That if the act of the Vice-President was such as to amount to a tortious conversion of the tools, the corporation was not liable for his acts. *Thomson v. The Sixpenny Savings Bank*,293

6. Proof that he acted by the authority and sanction of the President would not be sufficient to subject the corporation to such liability. .*id*

7. A subsequent demand of the property being made of the Vice-President at the place of his private business, he replied that he would lay the matter before the Trustees of the corporation: Held, that this did not render the corporation liable as for a refusal to permit the plaintiff to take his property.*id*

8. Whether, if the action had been against such Vice-President as an individual, his statement at the time he prohibited the removal, that he only claimed to detain such tools as were fixtures, and as such belonged to the corporation, would have justified him in forbidding the removal of any tools until the question which were fixtures was determined, or would have been a defense? *Quere*.*id*

9. And whether the subsequent consent of the plaintiff to refer the question, which were fixtures, to the counsel for the respective parties, and to abide by their decision, was

not a waiver of any such previous wrong, if any? *Quara*id

10. It is not necessary to aver that defendants are a corporation, in declaring against a corporation. *Lighte v. The Everett Insurance Company*,716

Vide AGENT, 1.
BILLS OF EXCHANGE, 4, 6.
BY-LAWS, 1.
INSOLVENT CORPORATION.
INSURANCE COMPANY.
MONEYED CORPORATION.
PLEADINGS, 1, 2, 3, 4.
PLEDGE, 2, 3.
PROMISSORY NOTES.
USURY.

CORPORATION OF CITY OF NEW YORK.

Vide NEW YORK.

COUNTERCLAIM.

1. In an action by an assignee of one of three co-partners against the other two for an accounting, the defendants cannot set up as a counterclaim that in a transaction between them, and the retiring partner disconnected from the partnership business, they sold him goods and took therefor the notes of a third person, which on a compromise and settlement with the latter, after discovering his insolvency, they surrendered to him; and that they were induced by the fraudulent representations of the plaintiff's assignor as to the solvency and credit of such third person to take the notes, whereby they were damaged. Such a cause of action is not one against the plaintiff, and for that reason is not a counterclaim as defined by the Code. *Boyd v. Foot & Co.*,110

2. In an action on a note given for fixtures in a coal yard, under an agreement that if the lease be not

renewed the vendor will refund half the loss on the fixtures, the maker of the note may counterclaim such loss and it appearing that the fixtures have not been sold, the amount to be allowed as a deduction from the note will be one-half the difference between the value of such fixtures for use under a renewed lease and their value for the purpose of removal. *Wiltis v. Northam*,421

Vide MONEYED CORPORATION, 1, 13.
PLEADINGS, 13, 14.
PROMISSORY NOTES.

COVENANT.

1. In an action for a breach of the covenant of seizin in a conveyance of land, where the breach was assigned in the complaint by negating the words of the covenant, and the answer averred the contrary, (viz., that the defendant was, at, &c., the true and lawful owner, &c.,) in the exact words of the covenant: *Held*, that the defendant held the affirmative of the issue and the burden of proof, and must prove his title. Accordingly, where, upon the trial of such an issue, neither party offers any evidence, the plaintiff is entitled to judgment. *Potter v. Kitchen*,566
2. One who violates his covenant to build a party wall, one-half on his own and one-half on another's land, by not extending it so far as the covenant requires is not entitled to an injunction to restrain such other from making the extension which he ought himself to have made. *The Rector, &c., of the Holy Innocents v. Keech*,691

CREDITORS.

Vide DEBTOR AND CREDITOR.

ATTACHMENT, (Priority acquired by.)



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CUSTOM.

Vide USAGE.

D

DAMAGES.

1. Where goods entrusted to a carrier by water are lost at the port of shipment before the vessel sails, but without any actual negligence on his part, the rule of damages is the value at the port of shipment without interest. *Lakeman et al. v. Grinnell et al.*,.....625

2. In an action for causing death of a horse in course of transportation, at a place where such a horse has no ascertainable market value. *Vide Harris v. Panama Railroad Company*,312

3. New trial granted because the amount of damages not warranted by the evidence.*id*

Vide NEW TRIAL, 5, (Excessive damages.)

NEW YORK.

PROMISSORY NOTES, 15.

DEBTOR AND CREDITOR.

1. An unconditional agreement between an insolvent debtor and part of his creditors to accept his notes for a designated portion of the amount he owes to them severally, in satisfaction of the whole, is obligatory upon such creditors. *Hall v. Merrill*,.....266

2. The relinquishment of a part of their demands by those signing the agreement, and the surrender of their right to enforce them in full, is a sufficient consideration to uphold it.*id*

3. Such an agreement implies, though it does not in terms contain, a promise of each of the creditors signing it, to and with every other of such creditors, to accept the composition stipulated for, and to abstain from all efforts to collect more.....*id*

4. Where such an agreement bears date December 15, 1857, and provides that the notes to be accepted in satisfaction shall be for equal amounts at six, nine and twelve months, from January 1, 1858, it is not indispensable to the continuing validity of the agreement that such notes be delivered or tendered on said 1st day of January. If no demand of them be made, they must be tendered within a reasonable time.*id*

5. An attaching creditor may impeach a fraudulent transfer, by his debtor, of his personal property. *Thayer v. Willet, Sheriff*,.....344

DEED.

1. Deed recorded as a deed, intended as a mortgage, but accompanied by a defeasance which is not recorded, will protect a purchaser from the grantee, who buys in good faith without notice of the defeasance, against the grantor (or mortgagor) and those claiming under him. *Stoddard v. Rotton*,.....478

2. In action in covenant of seizin, the defendant alleging seizin has the burden of proof. *Potter v. Kitchen*,566

DEFENSE.

Vide BANK CHECK.

COMMON CARRIER, 9.

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PLEADINGS—ANSWER.

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DELIVERY.*Vide* SALE, 1, 3, 4.**DEMAND AND REFUSAL.***Vide* CONVERSION.
DEBTOR AND CREDITOR.**DEMURRER.***Vide* PLEADINGS, 6, 8, 9 to 14.**DISCOVERY.***Vide* PRACTICE, *title* DISCOVERY.**DIVORCE.***Vide* ALIMONY.**E****EJECTMENT.***Vide* CONVEYANCE, 1, 2, 3.**EQUITABLE ASSIGNMENT.***Vide* INSURANCE, 7.**EVIDENCE**

1. Where, in an action to recover freight for carrying property in a certain vessel and on a voyage named, from New York to San Francisco, the defense is, in part, that it was not carried under such a contract as the bill of lading signed by the master expressed; but was carried under a special contract made

between the shipper and one R. R. Hunter; and that Hunter was duly authorized by the owners to make such contract; an admission at the trial that an advertisement (which was produced) was published prior to making such contract, daily in two newspapers (named) at the port where such merchandise was shipped, for a period of six weeks; stating (*inter alia*) that persons desiring freight should "apply to R. R. Hunter, 80 Broadway; J. Belknap Smith, 88 Wall street; or to the captain or agent on board at Pier 4, North river," imports that such advertisement was published by authority of the owners of the vessel; and that each of the persons named in it was authorized to make contracts for the carrying of goods in the vessel on that voyage. *Trask v. Jones et al.*.....62

2. After such evidence of Hunter's authority to contract had been given, evidence of a contract between him and a shipper of goods in such vessel for the particular voyage, fixing the rate of freight to be paid, was admissible.62

3. Entries in the books of a co-partnership, made by one partner after the dissolution, are not evidence against the other partners. *Boyd v. Foot & Cole*,.....110

4. Proof of cotemporaneous purchases not shown to be fraudulent, are not evidence that a purchase in question unaccompanied by any false representations was fraudulent. *Durbrow et al. v. McDonald et al.*, 130

5. Where an Insurance Company issued to another an open policy for an amount stated, reinsuring such other Company against a certain class of risks described, at a stipulated premium expressed in the policy of reinsurance, such stipulation cannot be altered and the recovery of the premium be reduced or defeated by parol evidence of a

- verbal agreement, made before or at the time of issuing the policy, that the reinsuring Company would not require the payment of the full premium stipulated, but would abate therefrom fifteen per cent of the gross amount of premiums earned. *The St. Nicholas Insurance Company v. The Mercantile Mutual Insurance Company*, 238
6. To allow such proof to operate would violate the rule which makes the writing conclusive proof of the actual agreement between the parties, and forbids that the operation and legal effect of a written instrument shall be varied, altered or affected by proof of a prior or contemporaneous parol agreement relating to the same subject matter. *id*
7. A written instrument may sometimes be reformed on proof that by mistake it was so drawn as not to express the actual agreement of the parties. *id*
8. The force and legal effect of an unequivocal and unambiguous agreement between Insurance Companies cannot be altered by proof that there is a usage and custom not to require its performance. *id*
9. On a question of due diligence on the part of a notary in endeavoring to find the makers of a note to make presentment, the replies he received to inquiries made of third persons and his acts thereupon are competent evidence. *Adams v. Leland, et al.*, 411
10. Where, in an action on contract for the sale of goods, wares and merchandise, a former recovery upon the same cause of action in a suit between the same parties is set up as a defense, a record of a recovery in a former suit in favor of a plaintiff and against a defendant of the same names, where the complaint in each suit alleges, as the only cause of action stated, the sale of goods, wares and merchandise by the plaintiff to the defendant during periods ending on the same day, and claims the same sum to be due, furnishes *prima facie* evidence of the truth of the defense. *Agate v. Richards*, 456
11. Identity of name in connection with the same or the like subject matter is presumptive evidence of identity of person. *id*
12. In an action against two defendants to set aside a deed of land from one to the other as a fraud upon the plaintiffs as creditors of the vendor; the record of a judgment by the plaintiffs against such grantor, is conclusive evidence against him that he owed the amount of it when the suit was brought in which it was recovered. *The New York and Harlem Railroad Company v. Kyle et al.*, 587
13. It is also *prima facie* evidence of the same fact against such vendee, upon proof being made of the facts stated in the complaint in such action, as the cause of action therein; and an admission in the answer of the vendee in the suit against him and his grantor of the facts constituting such cause of action is sufficient evidence thereof. *id*
14. The record of such recovery against such vendor, although recovered in an action in which said vendee was named as defendant in the summons and complaint therein, and although the complaint therein stated the same facts to impeach the good faith and validity of said deed as the complaint in the last action, is of no effect as evidence for either party upon the question of the validity of such deed, such vendee not having been served with the summons, nor appeared in the first action. *id*
15. Where a subscription is made in writing by which the subscribers agree to advance their notes to an Insurance Company for premiums

to be thereafter effected, it is not competent for a subscriber in defense of an action on his note to prove that parol agreements were made, with some of the subscribers, that they should not be required to give their notes, or that they should be otherwise favored above other subscribers. (Slosson, J., dissented.) *New York Exchange Company v. De Wolf*,593

Vide BOND.

BOOKS OF ACCOUNT.

BURDEN OF PROOF.

INSURANCE COMPANY, 3.

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PARTNERSHIP, 2, 3, 4.

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PROMISSORY NOTES, 20, 22.

SETTLEMENT.

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VERDIOT.

EXCEPTIONS.

Vide NEW TRIAL, 1, 3, 6.

EXPRESS COMPANY.

1. *Held*, carriers and not forwarders merely. *Read et al. v. Spaulding*, 395

F

FACTORS AND AGENTS.

Vide AGENTS.

ATTACHMENT.

PRACTICE, *vide* DISCOVERY.

FORMER ACTION.

Vide SETTLEMENT.

FORMER JUDGMENT.

Vide EVIDENCE, 10, 14.
JUDGMENT, 1, 2.

FORMER RECOVERY.

Vide EVIDENCE, 10, 11.

FORWARDERS.

1. Express company receiving goods, to deliver, for a price covering whole cost of transportation: *Held*, carriers and not forwarders merely although they use the conveyances of others in performing their service. *Read v. Spaulding*,395

FRAUD.

1. Admissibility of contemporaneous transactions in evidence. *Durbrow et al. v. McDonald et al.*,130

FRAUDS, STATUTE OF.

1. Where, by a written and sealed contract between B and C, B covenanted to furnish the brown stone for eight houses, and set them by a certain time, for \$2,000, to be paid in notes of \$500 each, to be made by R, and delivered as the work progressed, and C agreed to pay therefor in such notes accordingly; and C drew an order on R to deliver such notes to B "when the stone is delivered according to the contract, and at such times as therein stated," and R afterwards accepted such order by an indorsement thereon signed by him thus: "Accepted Oct. 17, 1856," the contract of R is one to answer for the debt or default of C, and the writing so signed by him does not express the consideration thereof, and is void by the statute of frauds. *Wilson v. Roberts*,100

2. R, in such a case, is not bound to deliver his notes to B, unless the latter performs his contract according to its terms.id
3. C cannot, in such a case, extend the time for B to perform such contract, without the consent of R, without discharging R from liability.id

FRAUDULENT CONVEYANCE OR TRANSFER.

1. In an action against a Sheriff to recover the possession of personal property which the latter has seized under an attachment issued in an action on contract, pursuant to the Code, against the plaintiff's vendor, the Sheriff may allege in his answer, and show by way of defense, that the transfer to the plaintiff was made with intent to defraud the creditors of his said vendor, having first shown the existence of a debt by such vendor, to the plaintiff in such attachment, and that the attachment was duly and regularly issued and executed. *Thayer v. Willet, Sheriff*, 344
2. It is essential to the right of plaintiffs in a judgment to maintain an action to set aside a deed of real estate made by the defendant in such judgment, as having been made with intent to defraud creditors, that an execution should have been issued on such judgment to the Sheriff before suit brought. *McCullough v. Colby et al.*,477
3. Unless the complaint avers the fact of issuing such execution, it will not state facts sufficient to constitute a cause of action.id
4. Although such an execution be issued after suit brought, that fact cannot be made a part of the plaintiff's case, either by amendment of

his complaint or by supplemental complaint.id

5. A deed by one who at the time of making it is largely in debt, made with intent to defraud his creditors, is void as against them, when executed without consideration, though executed to a person ignorant of the fact that such grantor was insolvent and unable to pay his debts. *New York and Harlem Railroad Company v. Kyle and Earle*,587

FREIGHT.

1. Where a charter-party stipulated on the part of the charterers, that the master should be supplied by them with a sum not exceeding one-third of the freight "free of interest and commission, which is to be in part payment of the freight at the exchange of twelve per cent premium, together with the cost of insurance on such advance," and by further provisions any other advances they thought fit to make on the credit of the freight should, with premium, interest, commission and insurance, be considered in part payment of freight. Advances made under the first stipulation, where the voyage is in part performed, are at the risk of the charterers, voluntarily placed by them at the hazard of the voyage, and are to be deemed freight earned, and not liable to be refunded, though the vessel is afterwards lost. *Kinsman v. The New York Mutual Insurance Company*,460
2. Where the service has been in part performed, and the owner voluntarily receives the goods at an intermediate port, to which the vessel is driven by perils of the sea, freight *pro rata itineris* is earned and may be demanded.id

*Vide ASSIGNMENT, 1.
EVIDENCE, 1.*

H

HUSBAND AND WIFE.

1. A promissory note, signed by the wife and delivered by the husband, for the purchase of property used and enjoyed in a business carried on for their joint benefit, does not operate both as a note of the husband making him personally liable and as an appointment by the wife of her separate estate or as a charge thereon. *Palen v. Lent*,713

I

IDENTITY OF NAME.

Vide EVIDENCE, 10, 11.

ILLEGAL CONTRACT.

Vide CONTRACT.

INDORSEMENT.

1. Where notes are pledged as security for the repayment of a loan, and the pledgor indorses such notes making them payable in terms to the pledgee "for account of" himself (e. g., "pay A B, for account of C D,") the pledgee takes the title to the notes, and may sue upon and collect them. Such collection and the application of the proceeds to the payment of the debt due to himself is receiving payment for account of the pledgor, within the meaning of such an indorsement. *Nelson et al. v. Wellington*,178
Smith et al. v. Hall,319
2. The uniform custom and habit of an insurance company is sufficient

evidence of the authority of its president to indorse notes by way of transfer. *Scott et al. v. Johnson*,213

Vide INSURANCE COMPANY, 6.
MONEYED CORPORATION, 10.
PLEADINGS, 1, 2.
PROMISSORY NOTES, 11.

INJUNCTION.

Vide PRACTICE, title INJUNCTION.

INSOLVENT CORPORATION.

1. A transfer of collateral security made in good faith to secure a present loan to be used in due course of business, is not a transfer with intent to give a preference within the act (§ 9) forbidding transfers by corporations, when insolvent, with intent to give a preference to one creditor over others. *Holbrook v. Basset et al.*,147
Nelson et al. v. Wellington,178
2. An Insurance Company cannot be said to be insolvent, or to act in contemplation of insolvency, within the act last mentioned, merely because the sums insured greatly exceed its capital; nor when its assets are more than sufficient to meet all losses of which the Company has any notice, information or suspicion; nor under such circumstances can a loan made by the Company, secured by collaterals, for the purpose of meeting the liabilities of the Company as they arise, with the belief that the Company is solvent and will meet all its engagements, and in order to sustain the Company in its business and enable it to do so, and with the application of the money raised to that object, be deemed a transfer with intent to give an unlawful preference.id

INSURANCE.

1. An insurer of passage money, generally for the voyage, by a policy in the usual form of a freight policy, is not liable because the vessel is delayed on her voyage by perils of the sea, if she actually makes the voyage in suitable condition to carry to the port of destination all who embark on the voyage. *Howard et al., v. Astor Mutual Insurance Company*, 38
2. Insurance of passage money, generally, is not an undertaking that the ship shall perform the voyage within any particular time, or that the insured shall have the benefit of special contracts for passage. But only that the ship shall not be prevented by the perils insured against from making the voyage, and earning the passage money of those who embark in her; and that she shall not by a peril insured against be prevented from using her ports and receiving and transporting such persons as have engaged passage and are ready to embark in her.....*id*
3. Mere delay of arrival is not ground of recovery from the insurer, although in consequence of such delay those who have engaged and paid in advance for passage at an intermediate port for the residue of the voyage, refuse to wait, and demand and receive back their passage money.*id*
4. Where a policy of insurance upon buildings against loss or damage by fire provides "that in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without the consent of the insurers manifested in writing, the policy shall thenceforth be void and of no effect," and where the insured contracted to sell and convey the insured property to one S. for \$5,500; viz.: \$2,500 cash, and \$1,500 in twelve and \$1,500 in twenty-four months, and to keep

- the premises insured, and that the benefit and indemnity against loss and damage by fire should enure to the said S., who was to pay to such insured the premium she might pay for the insurance, and to convey the property by warranty deed to S. on full payment by him of the purchase money; and S. forthwith took and kept possession of said premises, and where subsequently and after the \$1,500 first payable had been paid, and before the other \$1,500 was paid, and while the policy was in force, the premises were damaged by fire to more than \$2,000, the sum insured; and where no notice of the contract between the insured and S. had been given to the Company until after the loss; the insured is entitled to recover to the extent of the unpaid purchase money and interest due thereon, and to that extent only. *Shotwell v. The Jefferson Insurance Company*,247
5. The contract and its partial performance do not transfer or terminate the whole interest of the assured; but it continues to the extent of the amount of the purchase money remaining unpaid.*id*
6. It is no defense or ground for exonerating the insurers from liability, that after suit brought upon the policy and prior to the trial, S. paid the purchase money in full and received a deed of the insured premises.*id*
7. By force of the agreement between the insured and S., the latter is entitled to the benefit of the sum recovered; and becomes equitable assignee of the right of action accruing from the loss by fire; the policy in force at the time of the loss having been obtained by the insured pursuant to the said contract between her and S., and the latter having paid to the insured the premium thereon.....*id*
8. In an action upon a marine policy

- upon a ship, to recover for a total loss, the ship having sunk at sea, it is not a defense that the insured sold and transferred his interest in her before she sunk, where it is shown that, prior to such transfer, she received an injury from the perils insured against, which rendered it impossible to keep her afloat, and made her subsequent actual loss inevitable. *Crosby et al., v. The New York Mutual Insurance Co.*,...369
Duncan v. Great Western Insurance Company,378
9. Where a vessel is so injured by the perils insured against that the assured has no means of saving her, and she subsequently sinks solely in consequence of such injury, the loss of the assured, from the time such injury is inflicted, is, practically and in substance, total, notwithstanding he may, in ignorance of the facts, have sold and transferred his interest in her after she received such injury, and before she was actually sunk.....id
10. The fact that a vessel, after very slight repairs, does actually perform many voyages, and with repairs greatly less than would justify her sale and an abandonment to an insurer, does actually continue in service for many years, being pronounced seaworthy and capable of performing voyages to any part of the world, greatly outweighs the opinion of her master, and surveyors, making an examination by his request, that repairs are necessary, exceeding half her value; and this is especially true when, after such sale and abandonment, the cause of the leakage, ascribed by such surveyors to injury by perils of the sea, is found to be two auger holes bored in her side which may be stopped at a trifling expense. *Kinsman v. New York Mutual Insurance Company*,460
11. Where freight is insured and the ship is disabled after her service is in part performed, it is the duty of the master to earn freight if he can, by forwarding the cargo by another vessel, and where, in such case, he voluntarily gave up the cargo to its owners, and they sent it on by another vessel, a finding that there was no evidence that he could have earned freight, (in the absence of any proof of the cost of the shipment by such other vessel,) cannot be sustained. The service having been in part performed, it is to be presumed that freight is earned, unless the plaintiff proves that the cost of forwarding exceeded the freight payable by the owner.....id
12. Where the service has been in part performed, and the owner voluntarily accepts the goods, freight *pro rata itineris* is earned, and may be demanded.id
- The defendants, an Insurance Company located in New York, executed and delivered to J. Day & Co., of Apalachicola, Florida, a Marine Policy, being in form a Cargo Policy, numbered 784,) by which they in terms, "on account of whom it may concern, to cover only property which may be indorsed hereon, by said J. Day & Co., loss, if any, payable to the parties named in the certificate granted by said J. Day & Co., and subject to conditions contained therein, and not inconsistent with the terms of this Policy, do make insurance, * * lost or not lost, at and from ports and places to ports and places, on cotton," &c. \$250,000 was written on the margin of the Policy as the sum insured. With this Policy the defendants delivered to J. Day & Co. blank certificates, to be issued to persons who might contract for insurance under the Policy; which certificates state that the person named in them, respectively, is insured by the defendants; and they also delivered to J. Day & Co. a letter of instructions, which states, *inter alia*, that said certificates are each of them considered by the defendants "as representing a Policy issued by the Company itself"

November 14, 1853, the defendants, by a written certificate of that date, extended the sum insured by Policy No. 784, an additional \$250,000. On the 28th of October, 1853, the defendants issued a further policy, (numbered 993,) for \$250,000 to J. Day & Co., in form like that numbered 784.

J. Day & Co. pasted the Policy No. 784 in a large book, (called their Policy Book,) entered in it the substance of each certificate issued by them, and the fact and date of issuing it, and also the aforesaid certificate of renewal of Policy No. 784, and the further Policy No. 993. The risks attaching during each month under the certificates, as these amounts were ascertained, were entered in said Policy Book, and numbered consecutively as entered, in a column in which specific risks were also entered and numbered as entered.

On the 15th of November, 1852, J. Day & Co. issued to the plaintiff one of said certificates, indefinite as to amount, thereby insuring, under Policy No. 784, cotton to be shipped by persons, and at and from places named therein, consigned to the plaintiff. This certificate was renewed November 15, 1853, by an indorsement made thereon by J. Day & Co., (and entered in said Policy Book,) continuing the insurance until July 1, 1854. The cotton in question, which was covered by the terms and embraced within the insurance stipulated by the certificate issued to the plaintiff, was shipped on the 1st and 2d of February, 1854, and on the 3d was totally lost by the perils insured against. Early in February, 1854, it was ascertained that all risks taken from the commencement of the business, including specific risks, exceeded \$750,000 in the aggregate prior to the time the cotton in question was shipped. This suit was brought to recover the value of the

cotton shipped February 1 and 2, 1854, and the complaint was dismissed, on the grounds that J. Day & Co. could not make valid contracts exceeding \$750,000 in the aggregate, and that when the risks actually taken had reached that sum all certificates of insurance previously issued became inoperative and void. On appeal it was *held*:

13. That the certificate so issued to the plaintiff was the contract of the defendants, and obligatory from the time of its delivery. *Hartshorne v. The Union Mutual Insurance Company*,538
14. That such certificate covered the cotton in question.....*id*
15. That, as between the plaintiff and third persons subsequently insured, whether insured under similar certificates issued, or upon specific risks taken subsequent to the issuing of the plaintiff's certificate, the plaintiff's contract, being first in point of time, gives him priority of right, and that he is to be protected in preference to them, even if it be held that J. Day & Co. could not bind the defendants for sums exceeding \$750,000 in the aggregate. That J. Day & Co. having, by the certificate issued to the plaintiff, insured all cotton described therein to be thereafter shipped to him, could not deprive him of the benefit of that insurance by subsequently insuring others.....*id*
16. That, without deciding the question whether J. Day & Co. could make valid contracts of insurance for sums exceeding \$750,000 in the aggregate the judgment should be reversed and a new trial granted. *id*

Vide FREIGHT, 1, 2
RE-INSURANCE, 1.

INSURANCE COMPANY.

1. An Insurance Company which, by the terms of its charter, is authorized for the better security of dealers, to receive notes for premiums in advance from those who intend to receive its policies, and to negotiate such notes for the purpose of paying claims or otherwise in the course of its business, has power to transfer such notes as security for the repayment of a loan of money made to the Company, and received and applied to the payment of losses, expenses, &c., in the ordinary conduct of its business. *Scott et al. v. Johnson*,..... 213

2. A person who lent money to such Company, in good faith, on the transfer to him, as collateral security, of subscription notes given for premiums in advance, amounting to over \$1,000, and without any notice that there had been no previous resolution of the Board of Directors authorizing the transfer, is entitled to recover thereon against the makers, although no such resolution had been passed. *id*

3. Where there is no allegation in the answer under which usury between the Company in such case and the lender can be available as a defense, it is not error to reject evidence of the rate of interest charged on the loan. If proof that the lender charged more than seven per cent per annum is not admissible to establish usury, it is not relevant for any purpose: it has no bearing on the question whether the plaintiff is a *bona fide* holder in any other aspect. *id*

4. An Insurance Company, incorporated by the laws of New York, cannot make a valid transfer of its notes, amounting to over \$1,000 in the aggregate, unless it is authorized by a previous resolution of the Board of Directors, if such transfer be made merely as security for a prece-

dent debt, and to a person knowing that there is no such resolution authorizing the transfer. *Smith et al. v. Hall*,..... 319

5. When the transfer is made to a firm, one of whose members is a Trustee of the Company, the firm has constructive notice of the non-existence of such a resolution. *id*

6. Where the complaint alleges an indorsement of the note by such Company to the plaintiff, and the answer denies the fact of such indorsement, and avers that the transfer was made by some officer or officers of the Company, when it was insolvent, to secure a precedent debt, proof is admissible that there was no resolution authorizing the transfer. *id*

Vide INSURANCE.

MONEYED CORPORATION.
PROMISSORY NOTES.

INTEREST.

1. Not recoverable in an action against a carrier for the loss of goods, if he be free from actual negligence, not even from the time of the commencement of the suit. *Lakeman et al. v. Grinnell et al*, 625

J

JOINDER OF CAUSES OF
ACTION.

1. A cause of action against a husband, entitling the plaintiff to a recovery of money from him, cannot be joined with a claim to charge the separate estate of the wife with the payment of the amount sought to be recovered. *Pulen v. Lent*,... 713

JUDGMENT.

1. A judgment between two persons, determining the title to land which both claim, makes part of the title, runs with the land, and concludes all who derive title to such land from either of those parties, subsequent to the recovery of such judgment. *Wilson v. Davol*,619
2. But it does not bind any person who derives title from either by a deed or lease executed prior to the commencement of the action in which such judgment was recovered. *id*

Vide EVIDENCE, 10, 12, 14.

PRACTICE, title JUDGMENT.
JUDGMENT ROLL.

L

LEASE.

3. The perfection of a title, by purchase at a Sheriff's sale on judgment and execution, extinguishes a lease given by the judgment debtor between the time of the Sheriff's sale and the execution of the Sheriff's deed. *Wilson v. Davol*, ...619

LIEN.

By attachment—Priority of, on goods consigned.....518

LIMITATIONS, STATUTE OF.

1. Where the chattels of A are used by B without any agreement as to compensation, (such use having begun in an expectation that B would purchase them,) and such use is continued until the chattels are worn out, although B is liable for the fair value of such use, the statute of limitations is a bar to a recovery for the use which was had

for any period antecedent to six years before action brought. *Rider et al. v. The Union India Rubber Company*,85

2. The presentation of a bill, containing items of alleged extra work, within six years before suit brought, and the payment of such bill, with the exception of one item, the accuracy of which and liability for which is promptly denied, will not prevent the statute barring all right of action for such item at the end of six years from the time when the alleged service was fully performed. *Peck v. The New York and Liverpool United States Mail Steamship Co.*,226

3. The items of debit for the contract price of the vessel, and for extra work alleged to have been done, and of credits for payments made, do not make a case of "reciprocal demands," within the meaning of section 95 of the Code.*id*

4. To make payments on account of extra work done save all items of work actually done from the operation of the statute, such payments must have been made generally on account, so that they may be properly applied, as well on account of the work which is the subject of the action as of that the liability for which does not subsequently become a matter of dispute. But payments made on account, accompanied with a denial of any liability and refusal to pay for a particular item, do not operate to prevent the running of the statute as to that item.*id*

M

MANUFACTURING CORPORATION.

Power to accept bills of exchange. 275

Vide CORPORATION.

MARINE INSURANCE.

Vide INSURANCE, 1, 2, 3, 8, 9, 10, 11, 12.

MARRIED WOMAN.

Note by wife used by husband for the purchase of property used and enjoyed by both, effect thereof considered; and complaint thereon against both held bad. *Palen v. Lent*, 713

MASTER AND SERVANT.

1. See NEGLIGENCE. Liability of owner for negligence of servants of contractor in building on his land. *Gilbert et al. v. Beach*, 445
2. Railroad Company not liable for act of a person, though he may be in their employment in some capacity, if he be not at the time of the act acting in any matter on behalf of the Company or attending to their business. *Weldon v. The Harlem Rail Road Company*, 576

Vide COMMON CARRIERS, 9, 10.

MONEYED CORPORATION.

1. Where a moneyed corporation discounts the note of a third person on the security of shares of its own capital stock, owned by him and pledged therefor, and such note is not paid at maturity, and the directors of such corporation do not sell such stock, neither their omission to sell it, nor their omission to charge such shares at the amount actually paid thereon as a reduction of the capital stock of the Company, affects the liability of such third person to the Company. *Butterworth, Receiver, v. Kennedy*, 143
2. Such facts do not, by force of 1 R. S., 590, § 8, either extinguish the

stock or the liability of the pledgor for the amount of his note secured thereby. *id*

3. The effect of the charge which that section requires to be made is, that no dividends shall thereafter be made, "until the deficit so created be made good from the subsequently accruing profits of the Company." *id*
4. An agreement by which certain parties agreed to lend to an Insurance Company their notes to amounts specified, and to renew such notes from time to time until a day named, when they should be paid by the Company, the said "notes to be given to N. & S., as special Trustees, to be used by them as they may think proper for the benefit of the Company," is not in contravention of section 7 of "Regulations to prevent the insolvency of moneyed corporations," (1 R. S., 591,) which forbids an assignment or transfer of effects, except to the corporation directly and by name, and it is not void on that ground. *Holbrook v. Basset et al.*, 147
5. When, under such an agreement, and in pursuance of its stipulations, the Company delivered to the so-called special Trustees, as collateral security to provide for the payment of such notes, valid notes of third persons received for premiums in advance, and the notes so lent were discounted and the money paid over to the Company and used by it for the payment of its liabilities in due course of business, the transaction is valid, the transfer of the collateral securities is effectual, and the said special Trustees, or their transferee, (under a power to transfer contained in the agreement,) may collect the said premium notes from the makers. *id*
6. Such a transaction is not void for the want of power to borrow notes, merely because the Company, instead of borrowing money with

which to meet its engagements, borrowed notes, caused them to be discounted and used the money, under an agreement to pay the notes at maturity. *id*

7. Such a transaction is not void under section 8 of the act which declares that no transfer, not authorized by a previous resolution of the Board of Directors, shall be made by such a corporation of any of its effects exceeding in value \$1,000, when it appears that a resolution was passed authorizing the officers to give such security as they should think proper for those who should lend their notes, and the officers did in good faith, without fraud or collusion, deliver a suitable amount as such security, and it further appears, in reference to the particular notes transferred, that the Board also resolved that the officers proceed in liquidation of the liabilities of the Company therewith. *id*

8. A transfer by a moneyed corporation of negotiable notes, as collateral security to secure a present loan to be used in due course of business, is not a transfer with intent to give a preference to one creditor over others, within the act forbidding such transfers by a moneyed corporation when insolvent. And therefore upon that state of facts it is not error to reject evidence that at the time of the loan the corporation was insolvent. *id*
Nelson et al. v. Wellington, 178

9. Where property of a moneyed corporation (viz, a note made by third persons) is wrongfully taken by one of its officers, and all its claims against such officer, including its claim for the taking of such note, are subsequently settled, and a release given to such officer on taking his note for a balance agreed upon; although the persons acting in behalf of the Company, in making the settlement and giving the release acted without competent authority

to bind it, yet if the Company thereafter, with knowledge of such settlement and of its terms, indorses absolutely and appropriates to its own use the note received on such settlement, it thereby ratifies the settlement and vests in such officer title to the note so wrongfully taken, and he or his vendee can maintain an action on it against the makers. *Houghton v. Dodge et al.*, 326

10. When the proof is, that "the Company used the note" taken on such settlement, and "paid it to" a creditor "in payment of a debt which they owed to" such creditor, and there is no other evidence in respect to such transfer, the presumption is, that such transfer was made in a manner authorized by law and the charter and by-laws of the Company. *id*

11. A resolution of the Board of Directors directing the officer to proceed with certain notes, mentioned, to liquidate the indebtedness of the Company, is a sufficient authority to warrant the officers in settling an indebtedness to the plaintiffs by paying a part, appropriating an indebtedness from the plaintiffs not yet payable, in further payment, and transferring to them a portion of such notes as security for the balance on their agreeing to give further time of payment. *Brookman v. Metcalf*, 429

12. Such a transaction makes the plaintiffs *bona fide* holders for value in such sense that the transfer to them is valid, even without a resolution of the Board of Directors, though it exceeds \$1,000, if they have no notice of the want of such resolution. *id*

13. In such case the maker of the note cannot use as a defense by way of set-off or counterclaim, an indebtedness by the Company to him for losses which did not become paya-

ble until after the transfer of his notes to the plaintiffs. *id*

Vide **BILLS OF EXCHANGE.**
CORPORATION.
INSURANCE COMPANY.
PROMISSORY NOTES.

MORTGAGE.

1. Where a deed absolute in form and recorded as a deed is accompanied by a separate defeasance, which is not recorded, a purchaser from the mortgagee without notice of the defeasance acquires a valid title as against the mortgagor, and those claiming under him. *Stoddard v. Rotton*, 378

MUNICIPAL CORPORATION.

1. Liable for altering grade of street, in violation of a statute regulating the subject. *Leman v. The Mayor, &c., of New York*, 414

MUTUAL ACCOUNTS.

Vide **LIMITATIONS, STATUTE OF.**

MUTUAL INSURANCE COMPANY.

Vide **INSURANCE COMPANY.**
MONEYED CORPORATION.
PROMISSORY NOTES, 1 to 10, 17.

N

NAME.

1. Identity of name presumptive evidence of identity of person, when they appear in connection with the

same or a like subject matter. *Agata v. Richards*, 456

NEGLIGENCE.

1. Common carrier liable to injury to goods though caused by the "act of God," if by culpable negligence or unreasonable delay he exposes the goods to the peril. *Read et al. v. Spaulding*, 395
2. The owner of a lot of ground, who has contracted with masons, carpenters and other mechanics of competent skill, for the erection of a building thereon, in a safe and proper manner, is not responsible to third persons for injuries caused by the mere negligence of the contractors' servants in the prosecution of the work. *Gilbert et al. v. Beach*, 445
3. Where, by the contract with the carpenters, (in such case,) they had agreed to construct a suitable gutter to receive the water falling upon the roof, and a leader running down to the basement, where it was to be connected with a main pipe leading into the sewer, and the carpenters had left the leader unfinished over the Sabbath, not extending within twelve or fifteen feet of the ground, and negligently omitted to provide effectual means of carrying off the water, in consequence of which, during a storm, the water flowed through the leader to the ground, and thence into the premises of the plaintiffs next adjoining, and caused injury to their goods: *Held*, that the owner is not liable for the damages. *id*
4. *Held*, also, by the Superior Court, that the neglect of the plumber, who was to furnish and introduce the main pipe leading to the sewer, to introduce it in due season and before the storm, was no excuse to the carpenters for not extending the leader down to the basement, and did not make the owner liable. But

held, in the Court of Appeals, that if the neglect to put in the main pipe caused the accident, it was the duty of the owner to cause it to be done, and he is not excused by reason of his having contracted with the plumber to do it. *id*

5. Proof that a coach driven upon one of the piers owned by the corporation of the city of New York at the foot of one of the streets, breaks through a plank that is decayed, by means of which the plaintiff's trunk is thrown into the river, and its contents damaged, is not sufficient to sustain an action against the city for the injury, nor to put the defendants to proof of reasonable and proper care and diligence in keeping such pier in repair. (WOODRUFF, J., dissented.) *Garrison v. The Mayor, &c., of the City of New York*,497

6. In order to establish, even *prima facie*, a right of action the plaintiff must show affirmatively on his part not only that the plank was decayed, but that the proper officers of the corporation had notice that it was decayed, or show that it was obvious to the eye without any particular examination. (WOODRUFF, J., dissented.) *id*

7. In an action against a Railroad Company, to recover damages alleged to have been caused by the negligence of the defendants' driver in the management of his team in taking it through a public street after it had been detached from a car it had been drawing, a verdict for the plaintiff will be set aside as contrary to evidence, where the testimony is uncontradicted that the manner in which the team was managed was such as had been pursued by this and other similar Companies for years without accident, and was considered, by those engaged in such business, safe and discreet, especially where it is proved that the injury was caused by an unexpected and wanton as-

sault by a third person upon the team, by which it was frightened and rendered unmanageable, and while frightened and unmanageable ran over the plaintiff. *Weldon v. The Harlem R. R. Company*, .576

8. The Company is not responsible for such act of such third person, though he may have been at the time employed by it in some capacity, he not being at the time of such act actually attending to any business for which he had been employed, or acting in any matter in behalf of the Company..... *id*

9. A ship owner is liable for goods received on board for carriage, although the ship is burned in the port of shipment without actual negligence on his part, and before a bill of lading is signed. *Lakeman et al. v. Grinnell et al.*,625

10. Carrier of passengers may by special contract protect himself against liability for negligence of his servant, not being himself in any fault. *Boswell, Administrator, v. Hudson River Railroad Company*,699

NEW TRIAL.

1. Where the facts specially found entitle a defendant to a general verdict, the plaintiff will not be entitled to a new trial because portions of the charge may have been erroneous, when such portions of the charge could not possibly affect the minds of the jury in considering the evidence relating to or in determining such special facts. *Holdans et al. v. Butterworth*,1

2. A motion for a new trial on the ground of surprise, cannot be made as a matter of right, after judgment has been perfected. *Barnes v. Roberts*,73

3. Where, on an accounting between partners in a suit brought for that purpose, two of the defendants claim



- that a note of a third person for \$500 was contributed by the other partner, and was credited to him as so much capital, and that only \$200 of it was paid, and that \$300 of its amount should be charged by the Referee to such other partner, and it is so charged, the judgment will not be reversed merely because the Referee received incompetent evidence tending to prove that it had been paid in full, as it is clear that receiving such evidence was not prejudicial to the defendants. *Boyd v. Foot & Cole*, 110
4. Where, on such an accounting, a referee erroneously refuses to allow to the defendants the proper credit in respect to a particular item, the judgment will not necessarily be reversed. If the plaintiff chooses to stipulate to deduct the whole amount of the defendants' claim in respect to such item, the Court will order the deduction made, and affirm the judgment as to the residue. *id*
5. In an action against a common carrier to recover the value of a horse, alleged to have been fatally injured through the negligence of the carrier during its transportation by him, although the evidence in respect to its value be conflicting and proper to be submitted to the jury, yet their verdict will be set aside, as excessive in amount, if the verdict be for a sum which, in the opinion of the Court, is clearly much larger than is warranted by the evidence. *Harris v. Panama Railroad Company*, 312
6. It is the duty of counsel, when objecting to a question, if he states the ground of objection, (as he may properly be required to do,) to state an objection which is well founded, otherwise his exception to the decision of the Court which overrules his objection and admits the evidence will not avail him as an exception. *id*
7. Hence, when, on the trial of an action, a question is put to a witness, and it is objected to on a specific ground, which is properly overruled, and the objecting party excepts, that exception will be unavailing, and will furnish no reason for relieving the party from paying costs as a condition of obtaining a new trial, although the Court are of opinion that, upon other grounds, not suggested on the trial, the evidence was inadmissible. *id*
8. The Court may, nevertheless, if satisfied that injustice has been done, and that the jury may probably have been improperly influenced by the objectionable evidence, make that one of the considerations inducing them to grant a new trial on a case. *id*
9. Although the plaintiff establishes a *prima facie* cause of action, yet if the evidence on the part of the defendant is very greatly preponderating, a verdict for the plaintiff will be set aside and new trial granted. *Kinsman v. New York Mutual Insurance Company*, 460

Vide PRACTICE, title APPEAL

NEW YORK, CITY OF.

1. The Mayor, Aldermen and Commonalty of the city of New York, since the passage of the act entitled "An act to make permanent the grades of the streets and avenues of the city of New York," passed March 4, 1852, cannot, even under the authority of an ordinance passed by both branches of the Common Council and approved by the Mayor, change the grade of any street in said city, established by law when said act was passed, south of Sixty-third street, without becoming liable to the owner of any lot or building on the street so altered, for all damages caused to him, as such owner, by reason of the making of such change

of grade, unless such change is made upon the written consent of the owners of at least two-thirds of the land in lineal feet fronting on each side of the street opposite to and adjoining that part thereof, the grade of which is to be changed or altered. *Leman v. The Mayor, Aldermen, &c., of the City of New York*,.....414

2. By the terms of that act it is declared that it shall not be lawful for the Common Council of the city of New York to change such established grade, without such consent; if therefore they make such change and the defendants by their agents proceed to carry it into actual execution to the injury of the owners of lots on the street, the city is liable for the damage sustained. . *id*

3. Where, in consequence of the breaking through a plank in one of the piers belonging to the city, at the foot of a street, a coach was partially overturned, and the plaintiff sustained damage, proof that the plank was decayed is not *prima facie* evidence of negligence; the plaintiff must show that the proper officers of the corporation had notice of the defect, or show that it was obvious to the eye without any particular examination. (WOODRUFF, J., dissented.) *Garrison v. The Mayor, &c., of New York*,.....497

NOTARY.

1. Evidence of due diligence in making presentment to makers of a note, competency of answers made to his inquiries to find makers, considered. *Adams v. Leland et al*, 411

NOTICE.

(Of dissolution of Partnership.)

Holdane et al. v. Butterworth,1

NUISANCE.

Vide NEGLIGENCE, 1, 2, 3, 4.

O

OFFICERS OF CORPORATIONS.

1. Power to accept accommodation bills,.....275

2. Liability of corporation for their tort,293

P

PARTNERS AND PARTNERSHIP

1. Where a person (B.) is in partnership with another (T.), in a business described as the business of "The Atlantic Forge Company," but in which the correspondence is conducted and all contracts made in the name of T., (the name of B. in no manner appearing in the business,) and thereafter the firm is dissolved, and a new partnership is formed by T., the co-partner, and a third person, under a different name, to conduct the same business at the same place, and the partners in such new firm immediately send a notice of that fact signed by them, by post, to all who had dealt with the old firm, and subsequently a vendor who had never dealt with the old firm, makes a sale of goods on credit, nominally, to such former co-partner, T., in whose name the business of the old firm had been done, and takes a note signed by the new firm in its true name, he cannot charge the person, so retiring, as a continuing partner, although he knew by common notoriety that the person so retiring

had been a partner, and supposed that he then was, provided it was also a matter of public notoriety, on and after the formation of the new firm, that it had been formed by such co-partner and third person, in a new name, and that it had in fact transacted its business in such new name. *Holdane et al. v. Butterworth*,1

2. In the taking and stating of an account between partners, in an action brought for that purpose, the mere fact that certain items were charged after the dissolution of the firm, upon its books, to profit and loss, by some of the partners, is not of itself *prima facie* evidence against the other partners that they are items of loss properly chargeable to the firm. *Boyd v. Foot & Cole*,110

3. Where, on such a stating of an account, it appears that all of the partners, except one who withdrew, continued the same business in the name of the old firm, and, subsequently to the dissolution, took a judgment from a dealer with the old firm as security for the whole sum then owing to the firm, and after that, settled with him and gave him a receipt in full. Such facts are *prima facie* evidence that they were paid in full the balance owing to the old firm at the time it was dissolved.*id*

4. Where the capital contributed by the retiring partner consisted in part of a note made by a third person, and the continuing partners subsequently recovered a judgment on such note, and issued an execution which was returned satisfied, the presumption is that the continuing partners collected such judgment.*id*

5. On an accounting between partners, the defendants have the right to have each partnership transaction investigated, and its results embraced in the account to be stated

though there be no specification of it, or of the facts in respect to it, contained in the pleadings.*id*

Vide PRACTICE, title AMENDMENT, 2.

PARTY WALL.

Vide PRACTICE, title INJUNCTION.

PASSAGE MONEY.

1. Insurance thereon, what is the contract, and what constitutes a loss within the policy. *Howard et al. v. The Astor Mutual Insurance Company*,38

PAYMENT IN ADVANCE.

1. Freight when not recoverable back although the goods are not transported.460

PLEADINGS.

1. *Generally.*
2. *Complaint.*
3. *Answer.*
4. *Demurrer.*

1. *Pleadings Generally.*

1. Where, in an action by the indorsee of a note against the makers, the complaint alleges the making by the defendants of a note payable by its terms, to the International Insurance Company, or order, that such Company afterwards and before its maturity "duly indorsed the said promissory note, and the same was, thereupon, duly transferred and delivered to the plaintiff;" and where the answer merely avers that said Company never had "any legal existence as a corporation," and denies that "it had any legal power or capacity to transfer said note to

- the plaintiff by its indorsement or otherwise;" the making of the note by the defendants, and its actual and due indorsement and transfer by the Company, are admitted if proof be given of the incorporation of such Company under a charter authorizing it to transfer by indorsement promissory notes which it may own. *Ogden v. Raymond et al.*,16
2. Under such pleadings the defendants cannot show that the note, with others, amounting in all to over \$1,000, was transferred without a previous resolution of the Board of Directors of the Company authorizing such transfer.*id*
3. Nor can they under such pleadings show that some of the original subscribers, whose subscription notes were taken as the capital stock on its commencing business, were irresponsible and minors.*id*
4. Nor can they show under such pleadings that the corporation was dissolved and a receiver of its effects appointed, by due judicial proceedings, subsequent to the transfer by the Company of the note thus sued upon.*id*
5. Where, in such an action, and upon such pleadings, the pleadings alleging no other defense except that the note was an accommodation note and was known to the plaintiff to be such when he took it, and that it has been paid from other collaterals transferred with it as security for a loan made to the Company, and where it has been proved that a loan of \$15,000 was made on the security of \$19,000 of collaterals including the note in suit, and that only \$12,000 of the loan has been repaid; it is not error to reject evidence of the whole number of collaterals; or that judgments have been obtained upon some of the collaterals, or of what securities were at any time received for the loan, or were held at the time of the trial.*id*
2. *Complaint.*
6. A complaint which states that the defendants, as agents for the plaintiff, purchased stock, and on a settlement of the contract of purchase the vendor was found indebted in a sum specified, for which the vendor gave notes to the defendants as such agents, which they received for the plaintiffs, and which have since been paid to them, and that they refuse to pay over the same to the plaintiff, states facts sufficient to constitute a cause of action, although it does not state how the vendor of the stock did or could become indebted to the vendee. *Bates v. Cobb et al.*,...29
7. It would, it seems, have been sufficient if it had stated that the defendants, as agents of the plaintiff on a settlement with a third person received a note for the plaintiff which was paid to them at maturity and they refuse to pay over the money.*id*
8. A complaint in an action brought to set aside a conveyance of land as fraudulent, as against the plaintiff, a judgment creditor, does not state facts sufficient to constitute a cause of action, if it does not state that an execution has been issued on the plaintiffs' judgment. *McCullough v. Colby et al.*,477
9. Where an action is brought by several creditors of a limited partnership as plaintiffs, against the members of such partnership and their general assignee, under an assignment made for the benefit of creditors, to remove such assignee, procure the appointment of a Receiver, and compel a distribution of the assets, and the complaint merely states that one of such plaintiffs is a creditor in a sum specified, "on several promissory notes of said

firm made before the execution of said assignment," and that another plaintiff is "a creditor in the sum of \$1,900 and upwards," the complaint, will be ordered to be made more definite and certain, so as to state the several causes of action as particularly as is requisite in an action to recover a judgment *in personam* for the same causes of action. *Gray et al. v. Kendall et al.*, 666

10. A complaint which seeks to charge the separate estate of a married woman upon her promise must show that the consideration of the promise was some benefit to her separate estate, or that there was a distinct intention on her part to charge her separate estate. *Palen v. Lent*, 713

11. It is not necessary that a corporation, plaintiffs, should in the complaint allege that the plaintiffs are a corporation. *Lighte v. The Everett Insurance Company*, 716

12. Nor is it necessary, in declaring against a corporation, to allege that the defendants are a corporation. *id*

3. Answer.

13. An answer which professes to set up a counterclaim, to be sufficient as a pleading, must state facts which constitute a cause of action in favor of the defendant against the plaintiff. *Merritt v. Millard*, 645

Vide COUNTERCLAIM.

4. Demurrer.

14. An answer which professes to set up new matter as a defense, and does not state facts which constitute one, may be demurred to for insufficiency, if pleaded after chapter 723, of the Laws of 1857, took effect. (Laws of 1857, vol. 2, p. 554, § 153.) *Merritt v. Millard*, 645

Vide PARTNERS, 5.

PLEDGE.

1. Of Goods.

1. When an advance of money is made on the security of wheat represented to be shipped, with the understanding that the lender shall thenceforward have the control thereof, and that the bill of lading shall be issued to him, and it is so issued making the wheat deliverable to his order, the pledge is valid, the advance is to be deemed made on the credit of the wheat and the lender is entitled to retain the wheat notwithstanding the pledgor has broken the condition upon which the wheat was delivered to him. *Durbrow et al. v. McDonald et al.*, 130

2. Of Stock.

2. A bank that receives shares of its own stock as security for a note discounted and causes it to be transferred to its president, does not by merely neglecting to sell the stock, extinguish it nor lose the right to collect the note. The delay is not an acceptance of the stock in satisfaction. *Dutterworth, Receiver, v. Kennedy*, 143

3. Of Notes.

3. A moneyed corporation may transfer notes as security for moneys loaned to it, for the purposes of its business. *Holbrook v. Basset et al.*, 147

4. On a pledge of notes as such security, with power to sell the same at public or private sale for the repayment of the loan, a sale is not the only mode in which the security may be available—the notes may be collected—the pledge of promissory notes as security *ex vi termini* imports power to collect, and to collect by suit if necessary. *Nelson et al. v. Wellington*, 178

5. The pledgee in such case may sue in his own name, notwithstanding the notes are indorsed to him in this form, "Pay—for account of A. B." (the pledgor)—such indorsement is not inconsistent with the right to collect and apply the proceeds to the account of the pledgor by discharging his debt. *id*
See same point. *Smith et al. v. Hall*, 319

POLICY OF INSURANCE.

1. In an action to recover the premium fixed in the policy neither parol evidence of an agreement nor evidence of usage not to require payment of the amount so fixed, can be received. *St. Nicholas Insurance Company v. Mercantile Insurance Company*, 238

PRACTICE.

1. *Amendment.*
2. *Appeal.*
3. *Clerk.*
4. *Contempt.*
5. *Counterclaim.*
6. *Discovery.*
7. *Exceptions.*
8. *Joinder of Causes of Action.*
9. *Injunction.*
10. *Judgment.*
11. *Judgment Roll.*
12. *Jurisdiction of General Term.*
13. *Mistrial.*
14. *New Trial.*
15. *Order Appealable.*
16. *Parties.*
17. *Reference.*
18. *Service of Papers.*
19. *Stay of Proceedings.*
20. *Time.*
21. *Trial.*
22. *Undertaking.*
23. *Verdict.*
24. *Verification.*

1. Amendment.

1. Where, on the trial of an action of ejectment, the defendant is permitted to amend his answer, and allege that his possession is that of a mortgagee in possession, the plaintiff may, in the discretion of the Court, amend his complaint so as to convert the action into one to redeem from the defendant as a mortgagee in possession. (Per *HOFFMAN, J.*)
Stoddard v. Rotton, 378

2. A. & W. being partners, A., with the consent of W., transferred all his interest to D.; D. and W. covenanting with A. to continue the same business, and to collect and apply the assets of the old firm, (except such as was necessary to pay current expenses,) to pay the debts of the old firm. The new firm becoming embarrassed, D. instituted a suit against W. to obtain a dissolution of his partnership, an accounting between them and a proper application and distribution of the assets: *Held*, that A. could not, upon petition, obtain an order that he be made a party to the action, and that the complaint be so amended as to bring him before the Court on pleadings presenting his alleged right to an equitable application of the property of the new firm, originally belonging to the old firm, to the end that his rights in such property might be determined, and the property distributed accordingly.
Dayton v. Wilkes, 655

3. Such an action is not one for the recovery of personal property within the meaning of § 122 of the Code. *id*

2. Appeal.

1. When an action is tried before the Court without a jury, and the decision does not dispose of all the questions in controversy but directs a reference to state an account, no appeal regularly lies to the General

- Term from the order or decree until after such reference and final judgment thereon. *Griffin v. Cranston et al.*,658
2. But when the trial of an action is begun all the issues should be tried and disposed of, so far as the reference ordered to take the account does not embrace them. There are not to be two trials, one before and one after the reference. Where a reference is ordered on a trial, in order to enable the Court to give judgment, the hearing which may be had on the coming in of the report of the Referee is not to be a trial, but a mere review of what has been done before the Referee, and its confirmation or the contrary, and the application of the decisions already made on the trial to the account stated.*id*
 3. If the trial begun before the Court is terminated without deciding all the questions which ought to be determined before the reference is directed, and is left so unfinished that it should properly be deemed a mistrial, then an order made on such a trial, ordering a reference and appointing a Receiver, may be appealed from. Such a case is not within section 268 of the Code, forbidding the review of what is done on a trial before a Judge, except by appeal from the judgment.*id*
 4. And where an appeal to the General Term was taken from an order made on a trial without a jury, appointing a Receiver and directing a reference to state an account between the parties, and such appeal was argued and decided upon the merits, all of the proceedings on the trial being reviewed and considered and a new trial ordered, the Court refused to vacate the order granting a new trial and so reinstate the order of reference and appointment of a Receiver, which they have decided to be erroneously made.*id*
 5. The proceedings on the appeal to the General Term in the case, as last stated, were not without jurisdiction in such sense that the order of the General Term was void; nor will those proceedings embarrass the plaintiff in prosecuting his case on the new trial and subsequent proceedings to final judgment.*id*
 6. Where a defendant has a verdict against him at the trial, and makes a case to which amendments are served, and judgment is entered on the verdict while the case and amendments are with the Judge to be settled, the Court has the power, after the time to appeal has expired, to relieve the defendant from the judgment, and permit him to be heard on the case. *Jellinghaus v. The New York Insurance Company*,678
 7. But in order to justify the granting of such relief, the case should be one of unquestionable mistake on the part of the defendant, and evince perfect good faith, and should be meritorious.*id*
 8. Granting such relief even in such a case is going to the extreme verge of judicial discretion.*id*
 9. If granted, it should be upon terms of securing to the plaintiff payment of his verdict and costs, if a new trial is denied; and an election to admit service of notice of appeal as of the time that it might have been served as a matter of course, and thus restrict the defendant to a hearing, upon such appeal, of any exceptions he may have taken at the trial.*id*
 10. An order requiring the prevailing party to cause the judgment roll to be filed, and to pay costs of the motion, is an appealable order, and will be reversed. *Heinemann v. Waterbury*,686

3. *Clerk.*

1. Duty of, to enter judgment and attach together and file the papers constituting the judgment roll, and the party cannot be compelled to do it, or to cause it to be done. *Heinemann v. Waterbury*, 686

4. *Contempt.*

1. Where by a judgment or decree a defendant is required to execute an assignment or conveyance to the plaintiff, and an instrument in proper form is tendered to him, he is bound to execute it, although it has not been submitted to the Court or Judge for approval. *Hilliker, Receiver, v. Hathorne*, 710
2. It is, however, proper that such a judgment should provide for the settlement of the form of the instrument by a Judge or Referee, and if the defendant is in doubt respecting the propriety of the form of the instrument proposed, he should apply to the Court to have it settled. *id*
3. On a motion to punish a defendant for a contempt in not executing the assignment tendered, where the judgment did not provide any mode of settling the form thereof, it appeared that the defendant acted in good faith, under the advice of counsel deeming him not bound to sign the instrument in the form tendered; the motion was discharged without costs, on the defendant's executing the instrument. *id*
4. In an action by a Receiver, on behalf of a judgment creditor, to set aside an assignment of a lease, the Court, on the 27th of March, announced its decision that the assignment was void; that the plaintiff is entitled to an assignment thereof as Receiver, and to the rents thereafter to accrue from the tenants in possession. On the 1st of April, one of the defendants, who had heard, in general terms, that the case had been decided in the plaintiff's favor, but had no knowledge of the particulars, or that the plaintiff was by such decision entitled to the rents due that day, collected such rents. On the 9th of April, a judgment was entered in conformity with the decision, and was made to bear date of the day the decision was announced. The defendant was not under any injunction in the action, and the decision did not direct an injunction. Upon these facts, a motion to punish the defendant for collecting those rents, as for a contempt, was denied. *id*

5. *Counterclaim.*

Vide COUNTERCLAIM, (*ante*.)

6. *Discovery.*

1. On an application for a discovery of books, in order to enable the plaintiff to prepare his complaint, if it appear that the plaintiff is seeking to recover moneys received by the defendants, as his factors and agents, selling his goods, and they have not rendered accounts of sales in full, the Court will order them to render such account or give a copy of their book showing such sales from the time of the last account of sales rendered. The plaintiff, upon those facts, is entitled to such account of right. *Ruberry v. Binns et al.*, 685
2. But under color of an application for such a purpose, the plaintiff is not entitled to examine the defendants' books at large, or to have copies of them, for the purpose of seeing whether they conflict with the accounts of sales heretofore rendered. *id*

7. *Exceptions.*

Vide NEW TRIAL, 1, 3, 4, 6, 7.

8. *Joinder of Causes of Action.**Vide* JOINDER, (*ante*.)9. *Injunction.*

1. Where a party obtains the privilege of building a party wall, one-half on his own lot and one-half on the lot of another, and covenants that he will build such wall, but does not extend the wall so far as, by his covenant, he is bound to do, and thereupon the other party enters upon the ground and begins to extend the wall upon the land of each to the stipulated point or line, the latter will not be restrained by an injunction, at the instance of such party in default, from making the extension. *The Rector, &c., of the Church of the Holy Innocents v. Keech*,691
2. Even if, in such case, the party extending the wall has not obtained a strictly legal title to any of the ground of the other, or to the use thereof, still a Court of equity will not restrain him from doing what ought to be done, and what the other was bound to do for him...*id*
3. But, where the point, or line, to which the party wall was to be extended by the party covenanting is in dispute, and it is not clear what, in that respect, is the true construction of the covenant, and where, also, the extension of the wall, as attempted by the other, will require the cutting away of a stone stoop or portico and do permanent injury to the building of the former, the Court will interpose by injunction *pendente lite*, and restrain the extension until the right can be ascertained and settled by the aid of such extrinsic facts as may be properly proved to aid in determining the true meaning and effect of the covenant.*id*
4. The provision of section 220 of the Code requiring that on the service

of an injunction a copy of the affidavit on which it is granted be served therewith, is satisfied by the service of copies of whatever papers were laid before the Judge, and on which he ordered the injunction whether the allowance was upon a summons and a complaint duly verified or upon affidavits commonly so called. *Leffingwell, Receiver, v. Chave et ux.*,703

5. An injunction order may be allowed and signed by the Judge, and be delivered to the officer before the service of the summons upon the defendant; but the service of the order upon the defendant before the summons is served, is irregular and is ineffectual. (Code, §§ 220 and 99.)*id*
6. The neglect to file the papers upon which an injunction is granted within the time prescribed by the rules of Court, may be excused, and it does not render the service of the injunction a nullity or require that it be set aside.*id*

10. *Judgment.*

1. Set aside to allow an appeal to be taken.678
2. Duty of the Clerk to enter judgment.686
3. The question whether, when a judgment by default has been directed to stand as security, but the defendant suffered to defend, a second judgment should be entered on a subsequent recovery of verdict or decision by a Referee in favor of the plaintiff, discussed by *HOFFMAN, J. Heinemann v. Waterbury*, 686
4. Requiring execution of an instrument should prescribe some manner of settling the form of such instrument.710

Vide *title* JUDGMENT.

11. *Judgment Roll.*

1. Upon the filing of the decision of a Referee determining the cause, it is the duty of the clerk to enter the judgment directed by such decision; and if the prevailing party does not choose to furnish to the clerk a judgment roll, it is the duty of the clerk to collect from the files such papers as constitute such roll, and attach thereto a copy of the judgment. (Code, § 281.) *Heinemann v. Waterbury*,.....686

2. It is optional with the prevailing party to furnish a judgment roll or not, and he cannot be compelled by an order of the Court to cause a judgment roll to be filed.*id*

12. *Jurisdiction of General Term.*

Vide *APPEAL*, 5.

13. *Mistrial.*

Vide *APPEAL*, 1, 2, 3.

14. *New Trial.*

Vide *NEW TRIAL*, (*ante*.)

15. *Order Appealable.*

Vide *APPEAL*, 3, 10.

16. *Parties.*

Adding a party on his own petition.655

17. *Reference.*

Vide *APPEAL*, 1-5.

Review of proceedings before referee to settle amount of alimony. *Forrest v. Forrest*, 672

18. *Service of Papers.*

Vide *INJUNCTION*, 4, 5.

19. *Stay of Proceedings.*

1. In an action in which a divorce has been granted and a reference had to settle the amount of alimony, on which reference the testimony is very voluminous, and the amount, reported to be just, large, and the defendant's counsel alleging errors committed by the Referee, and being in doubt whether, under a system of practice recently introduced, it is necessary, in order to review the proceeding, to make a case and move thereon to set aside the report and for a new trial or further hearing before the Referee, or whether he can move on the report and testimony and his exceptions, the Court will extend the time and stay the plaintiff's proceedings to enable the counsel to determine his course, and prepare his papers. *Forrest v. Forrest*,672

2. It seems in such case that the review of the proceedings on such a reference is by a hearing of the exceptions on the testimony, report and minute of proceedings annexed thereto, and that no formal case is necessary. (Rule of Court, No. 32.).....*id*

20. *Time, Extension of.*

Vide *STAY OF PROCEEDINGS*.

RELIEF after time to appeal has expired.678
APPEAL, 6, 7, 8, 9.

21. *Trial.*

Vide *APPEAL*, 1-5.

22. *Undertaking.*

1. An undertaking duly approved by the Judge, procured or furnished by

the plaintiff or his attorney for the security of the defendant, and executed by any persons possessing the requisite qualifications, agreeing that the plaintiff shall pay to the defendant the damages he may sustain, is an undertaking "on the part of the plaintiff" within the meaning of section 222 of the Code, requiring security on granting an injunction. It is not necessary that it should be executed by the plaintiff or his agent or attorney. *Leffingwell, Rec'vr, v. Chave et ux*, ... 703

2. Such undertaking must be given in form absolute and binding either the plaintiff, or some one or more who undertake for him, absolutely for the payment of such damages; and it may, if the Judge require sureties, also bind others as sureties in form and in terms as sureties. There should be a principal and the Judge may require sureties; but such principal may be one who undertakes on behalf or for the plaintiff, without the latter being a party to the instrument. *id*

23. Verdict.

Vide VERDICT, (post.)

24. Verification.

1. Where several persons not united in interest join as plaintiffs in an action the complaint to be verified as the Code requires, must be verified by the oaths of the plaintiffs severally, who are not united in interest. *Gray et al. v. Kendall et al.*, 666

PRINCIPAL AND AGENT.

Vide AGENT.

PRINCIPAL AND SURETY.

1. Agreement of suretyship not expressing consideration, void. Extension of time discharges surety. *Wilson v. Roberts*, 100

tion of time discharges surety. *Wilson v. Roberts*, 100

PROMISSORY NOTES.

1. A Mutual Insurance Company took up a subscription, by which the subscribers agreed to give their notes for premiums in advance of insurance to be effected by them, the subscription not to be binding until the sum of \$300,000 was subscribed. That sum was in form subscribed, the defendants being subscribers, and the defendants voluntarily gave their notes for the amount of their subscription. All parties acted in good faith, and without any fraud, misrepresentation or concealment: *Held*, that such notes were, in the hands of the Company, valid binding notes, which the Company had a right to negotiate for the purpose of paying claims or otherwise, in the course of its business, notwithstanding it ultimately appeared that some of the subscriptions were not valid binding subscriptions, and notwithstanding, if the notes had not been given, the defendants might have legally refused to give them on the ground that the condition of the subscription had not been in fact satisfied. *Holbrook v. Basset et al.*, 147

2. Where an Insurance Company, in order to raise money for the immediate purposes of its business, borrowed notes from its friends and they were discounted and the money paid over and so used, and by the agreement the Company were to pay such notes and to secure that payment were to deposit and did deposit with the plaintiffs, as Trustees, certain negotiable notes received in its business, as collateral security, with authority to sell such collateral securities or any portion thereof at public or private sale at the option of the Trustees: *Held*, that a sale was not the only mode in which the securities could be

- rendered available. The power so given was not exclusive of every other authority. The Trustees had a right to receive payment of such collateral notes and to enforce payment by action. *Nelson et al. v. Wellington*,178
3. Where promissory notes are pledged as security, the transaction *ex vi termini* imports authority to collect. Superadding a power to sell, which without express agreement would not exist, does not take away the right to receive and to compel payment.....*id*
4. Where negotiable notes are by express agreement pledged as collateral security to secure the payment of money by the pledgor which he agrees to pay, the pledgee may sue in his own name on such notes, although the indorsement made thereon to carry the agreement into effect is in terms "pay to A. B." (the pledgee) "for account of C. D." (the pledgor.) Such an indorsement is not inconsistent with the lien of the pledgee and the right of the latter to collect the notes and to apply them to the account of the pledgor by discharging the debt they were pledged to secure.*id*
5. Where a note is given to an Insurance Company for the nominal premium upon an open policy, which policy was to attach to all risks that might thereafter be indorsed thereon and risks on which the agreed premium amounted to one-third of the note were so indorsed, and afterwards another risk at an agreed rate of premium on all goods shipped by the maker by a vessel named and for a specified voyage, was indorsed on the policy, the maker agreeing afterwards to report the amount of the invoice; such note is a note for valuable consideration, and in the absence of any evidence of the amount of the shipment last mentioned the maker is liable for the full amount of the note.*id*
6. Transfer by an agent for collection, as security for his own pre-existing debt, does not confer title as against his principal. *Scott v. Ocean Bank*,192
7. When it is proved that it is the uniform practice of an Insurance Company to transfer notes, negotiated in its business, by an indorsement in this form, "For the Company, A. B., President," such proof is *prima facie* evidence of authority in the President to indorse notes held by the Company, by way of transfer; and such indorsement is sufficient to confer the title on one who receives a note from the Company in good faith, and advances to them money thereon. *Scott et al. v. Johnson*,213
8. Subscription notes may be transferred by such a Company as security for a loan.*id*
9. Transfer to a *bona fide* lender without notice is valid, even though made without a previous resolution of the Board of Directors.*id*
10. Where a promissory note, payable to the order of the Atlas Mutual Insurance Company, was transferred and delivered to the plaintiffs as security for a debt due to them by the Company, and the indorsement was in form, "Pay.....for account of the Atlas Mutual Insurance Company, G. H. T., Secretary," the restrictive form of the indorsement forms no obstacle to the plaintiffs' recovery on the note against the maker. The collection of the note, and the application of it to the payment of the debt of the Company, would be according to the right of the plaintiffs, and it would be a payment for account of the Company. *Smith et al. v. Hall*,319
11. The owner of a promissory note can maintain an action on it, under the Code, in his own name against the makers, although not so indorsed that he can sue as indorsee by the

- rules of the common law. *Houghton v. Dodge et al.*, 326
12. Where the evidence as to the diligence of a Notary to find the makers of a note in order to demand its payment at maturity from them personally, is free from conflict, the question of its sufficiency to establish due diligence in that behalf is one of law. *Adams v. Leland et al.*, 411
13. The evidence given on the trial of this action, to establish due diligence stated, considered and held sufficient to make a *prima facie* case of due diligence. *id*
14. Statements made to the Notary by persons to whom he was referred at the makers' last, known place of business, as having knowledge of the makers, in answer to questions as to where the makers resided or could be found, held competent upon the question of the Notary's diligence to find the makers. *id*
15. Where by an agreement between L. & A., of the one part, and the defendant N., of the other, the former sell their fixtures, &c., in a coal-yard occupied by them, for a specific sum, and take N.'s negotiable note, and also sell to N., for other consideration, a lease of said yard, and guarantee its renewal on certain terms, and agree, if a renewal be not procured, "to refund the one-half the loss on such fixtures," and no renewal can be procured, and a suit is brought on such note by one who is an indorsee of it after its maturity, and there is no fraud in procuring the note or in the transaction on which it is founded, the most that the defendant can have deducted from the recovery on the note is one-half of the difference between the value of such fixtures for the purposes of use under a renewed lease and the value thereof for the purpose of removal. *Willis v. Northam*, 421
16. The plaintiff shows a sufficient title to the note to maintain an action on it, although he bought it by giving his own note for it, and, before the second trial of the action, took up his own note by assigning a judgment recovered in the action itself on a former trial of it, (which judgment was reversed and a new trial ordered,) and notwithstanding his vendors of the note and his assignees of such judgment are the persons to whom the note was originally given. *id*
17. A Mutual Insurance Company, for the purpose of increasing its available means, took up a subscription by which its friends agreed to give their notes for premiums in advance of insurances to be effected by them the subscription not to be binding until \$300,000 was subscribed. When the subscription was understood and believed to be made up, no fraud being practised on the defendant, he gave his two notes for \$500 each for the amount of his subscription, and he effected actual insurance to an amount for which the premiums were over \$900, which was charged to him against his said two notes, and he, in addition thereto, took an open policy upon which the premium considerably exceeded the remaining \$100, but no other risks were indorsed thereon except those included in the \$900: *Held*, that the two notes for \$500 each were valid binding notes, although it afterwards appeared that the whole \$300,000 subscription was not made up; the notes having been voluntarily given and there being no fraud on the part of the Company or its Agent. *Brookman v. Metcalf*, 429
18. Transfer by such Company to a *bona fide* holder for value, without notice, valid though no previous resolution of the Board of Directors. *id*
19. Where it is set up as a defense to a note that the maker had with

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- others subscribed in advance of premiums to be earned by an Insurance Company, upon condition that the subscription should not be binding until the sum of \$300,000 was subscribed, and that the note in suit was afterwards given for his subscription by the defendant, induced by a false and fraudulent representation that the whole amount had been subscribed, the burden is upon the defendant of showing that such subscription had not been made. *The New York Exchange Company v. De Wolf*, 593
20. In such case, where the defendant, produces several of the original subscription books, and the proof is clear that one book used in taking subscriptions is not produced, and other proof shows that, according to computations made at the time, a greater sum than \$300,000 had been subscribed, it is not error to charge the jury that there is no sufficient proof that the subscription was not made up, to the required amount. *id*
21. Where the resolution of the Insurance Company, under which the subscription was taken, expressly includes in the \$300,000 a previous subscription of \$40,000, made, but not paid in, and the agreement, signed by the defendant, refers to such resolution, that is notice to the defendant of its contents, and it is no defense that \$300,000 was not subscribed after the resolution was passed, and that the \$40,000 are necessary to make up the amount. *id*
22. Where some of the subscriptions were by other Insurance Companies the Court cannot, without the production of their charters, pronounce such subscriptions unauthorized and void. *id*
23. The agreement for the subscription being in writing, whereby the subscribers promise to advance their notes, and the defendant having subsequently given his notes for the amount subscribed, he cannot give as a defense that the persons who solicited the subscriptions verbally promised some of the subscribers that they should not be bound thereby to give their notes, or that they should have the privilege of substituting other notes, or other similar parol promise. (*Slosson, J.*, dissented.) *id*
24. Whether, if proof of such parol promise were otherwise admissible in the face of the written subscription, the defendant could give such evidence under an answer, which alleged no such facts, but only that the requisite amount had not been subscribed. *Quære?* *id*

Vide BILLS OF EXCHANGE.
CORPORATION.
INSURANCE COMPANY.
MONEYED CORPORATION.
HUSBAND AND WIFE.

PURCHASER.

1. *Of Chattels.*

1. One who buys from a tortious or felonious possessor acquires no title though he acts in good faith, and pays value therefor. *Anderson et al v. Nicholas*, 121
2. Purchaser is bound to accept goods on tender, or will be liable for the expenses of storage, &c., during the period of delay. *Dibble et al v. Corbett et al*, 202

2. *Of Land.*

3. Where a deed absolute in form given and intended as a mortgage is recorded as a deed, (the writing of defeasance being a separate instrument and not recorded,) a *bona fide* purchaser from the grantee, without notice of the defeasance,

acquires good title. *Stoddard v. Rotton*, 378

R

RAILROAD COMPANIES.

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May limit their common law liability as carriers of passengers by express contract. 699

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Vide PRACTICE, *title* REFERENCE.

REINSURANCE.

1. In an action to recover the premium stipulated in a policy of reinsurance, the defendant cannot alter the policy nor entitle himself to an abatement from the premium by proof of a usage and custom among Insurance Companies to allow an abatement from the stipulated premium nor by proof of a cotemporaneous parol agreement to make such abatement. *St. Nicholas Insurance Company v. Mercantile Mutual Insurance Company*, 238

S

SALE.

1. One who sells and delivers chattels by request of another who has no title nor authority to sell, is liable to the owner for the value, although he acted in good faith and has paid over the proceeds to his employer. *Anderson et al. v. Nicholas*, 121
2. A purchase from a thief or tortious taker confers no title. id
3. Where a valid contract is made for the sale and delivery of the wheat in a specified boat for cash; and the buyer designates a vessel into which the wheat is to be delivered and the seller accordingly has it measured as is customary in such cases and placed on board of such vessel, and sends to the buyer a duplicate measurer's return or certificate of the quantity, and a bill for the wheat at the contract price, and the seller thereupon requests payment from the buyer, who answers that he will pay on Saturday, (the second day thereafter,) and the seller makes no objection thereto; and where there is no fraud in making such contract or obtaining such delivery, a person in good faith advancing money on the same day to such buyer on the security of such wheat and on the faith of his being the owner thereof will obtain a valid title thereto as against the seller to the extent of such advance; although such buyer fails after obtaining such advance and thus becomes unable to pay to the seller any part of the contract price. *Durbrow et al. v. McDonald et al.* 130
4. Such a delivery being all the delivery which the parties contemplated or the contract required; it was subject to no condition unless it be an implied one, that payment be made if demanded, when all the wheat was delivered. id

5. Where, in such a case, an advance is made to such buyer upon the understanding at the time of both parties to it, that it is made on the security of such wheat; and that the person advancing should thenceforth have the control of it and that a bill of lading should be issued to him as the shipper of it, making the wheat deliverable to his order at the port of destination, and such bill of lading is immediately thereafter so issued and delivered; the person so advancing from the time thereof has the right of possession and of control, as against the seller. *id*

6. Evidence of other cotemporaneous purchases by such buyer and of his failure to pay therefor on the day he agreed to pay, there being no evidence that they were fraudulent or that any representations were made in negotiating the contract for the wheat in question, is inadmissible. *id*

Vide PURCHASER OF CHATTELS.
VENDOR AND VENDEE.

SEIZIN.

Vide COVENANT.

SET-OFF.

Vide COUNTERCLAIM.
MONEYED CORPORATION, 13.

SETTLEMENT.

(Of an action, effect of.)

1. Settlement by officers of a corporation without authority, what amounts to a ratification. *Houghton v. Dodge et al.*, 326

2. Where a party who claims a balance of account against another, and holds two notes as collateral
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security, assigns his account to a third person who brings an action thereon and the defendant therein claims to set off one of such notes which had been paid to the assignor, after the assignment but before the suit was brought, and afterwards the suit is settled by the payment of ten per cent of the sum sued for and costs, such settlement is no bar to an action by the defendant therein to recover from the said assignor the amount of the other note, although it was paid pending the former action and before the settlement. *Bates v. Cobb et al.*, 29

3. A settlement "in full of an account and demand sued upon in this action" does not embrace any matter not embraced in the controversy as disclosed by the pleadings therein. *id*

SHERIFF.

1. In an action for taking goods by an alleged transferee, the Sheriff, may show that he took the goods under an attachment against the transferor, and that the transfer was made with intent to defraud creditors, although the attaching creditor has not recovered judgment. *Thayer v. Willet, Sheriff*, 344

2. *Vide* LEASE. (Sheriff's sale and conveyance terminates lease.) 619

STATUTES, CONSTRUCTION OF

1 Revised Statutes, 590, § 6. Effect of transfer of stock pledged to a moneyed corporation, and omission to sell the same. *Butterworth, Receiver, v. Kennedy*, 143

1 Revised Statutes, 591, § 7. Transfer to moneyed corporation not valid, unless it be to

the corporation by name. *Holbrook v. Basset*,147
Nelson et al. v. Wellington, .178

- 1 Revised Statutes, 591, § 8.
 Transfers by moneyed corporation of notes without a resolution of the Board of Directors.
Holbrook v. Basset,147
Nelson et al. v. Wellington, .178
Scott et al. v. Johnson,213
Smith et al. v. Hall,319
Brookman et al. v. Metcalf, 429

- 1 Revised Statutes, 591, § 9.
 Transfers by moneyed corporation when insolvent or in contemplation of insolvency with intent to give a preference.
Holbrook v. Basset,147
Nelson et al. v. Wellington, .178

- 1 Revised Statutes, 756, § 3.
 Deed absolute in form, intended as a mortgage, but defeasance not recorded. *Stoddard v. Rotton*,378

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STOCK.

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STREETS.

City of New York liable for damages for changing the grade of a street when not done according to law. 414

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T

TITLE TO LANDS.

Vide DEED.
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 MORTGAGE.

TITLE.

(To personal property.)

1. One who has either tortiously, or feloniously, without the knowledge or consent of the owner, obtained the possession of a certificate of stock having a power of attorney in blank annexed thereto, cannot confer title on a third person by selling and delivering the same for a valuable consideration, although the purchaser acts in good faith, believing he is dealing with one who owns or has due authority to sell the stock. *Anderson et al. v. Nicholas*,121

2. One who receives such a certificate and power, and sells the same or causes the same to be sold, by direction of one whom he supposes to be the owner or to have due authority, is liable to the actual owner for a conversion of the stock, notwithstanding he has paid over the proceeds to the person employing him.62

TRANSFER.

1. Of a bill of exchange transferred as security for an antecedent debt by one who has no authority. *Scott v. Ocean Bank*,192

TRUST.

1. A transfer of notes by an Insurance Company, to two persons as security for the benefit of themselves and others who lend money or notes to such company, is not void so that the makers of the notes so held as security can refuse payment on that ground. *Holbrook v. Bassett et al.*,.....147
Nelson et al. v. Wellington,.....178

U

UMPIRE.

Vide APPRAISAL.

UNDERTAKING.

Vide PRACTICE, title UNDERTAKING.

USAGE AND CUSTOM.

1. The operation and effect of a policy of reinsurance cannot be impaired, or the obligation to pay the full premium stipulated in it be affected, by proof that there is a usage and custom among all Insurance Companies in the city of New York by which the reinsuring Company abates a per centage from the gross amount of premiums stipulated and does not require the payment of the full amount. *St. Nicholas Insurance Company v. Mercantile Mutual Insurance Company*,.....238
2. Nor would it operate to reduce the claim of the reinsuring Company to recover the full amount of premiums stipulated, if in addition to such proof of custom it were shown that prior to issuing the policy it was, in view of such custom, agreed by parol that fifteen per cent should

be so abated and payment thereof not required.*id*

Vide INDORSEMENT, 2.

PROMISSORY NOTES, 7.

USURY.

1. Whether, under a statute which forbids a corporation to interpose the defense of usury, a transaction, otherwise void for usury, is not entirely valid? and whether a third person can, for the purpose of affecting the title of the holder of a promissory note, allege and prove that he took it from a corporation and holds it under a usurious contract? *Quera. Scott et al. v. Johnson*, .213
2. It seems, that, under the statute last mentioned, if a maker of a note has no defense thereto in the hands of the corporation, he cannot, when sued thereon by an indorsee, allege and prove usury between the corporation and such indorsee. The title of the indorsee, being good as against the corporation, is good as against the maker...*id*

Vide INSURANCE COMPANY, 3.

V

VENDOR AND VENDEE.

1. Where a person contracts to purchase goods, which, at the time, are on board of a vessel at sea, and expected to arrive, it is his duty to receive such goods within a reasonable time after notice of their arrival and a tender of the goods at the place designated by him for the delivery of them. *Dibble et al. v. Corbett et al.*,.....202
3. Where such purchaser refuses to accept a delivery within a reasona-

ble time, he is liable to the vendor for the damages necessarily caused by such delay.id

3. Although the contract be made in such form that the title to the property does not pass until the goods are delivered, yet the contract being valid and obligatory, and the purchaser having accepted the goods under it, it is no answer to the claim for damages for delaying an unreasonable time to receive them, that the title of the purchaser does not become vested until the goods are delivered and accepted.id

VERDICT.

1. Although a plaintiff establishes by his evidence a *prima facie* cause of action, so that when he rests his case a refusal to order a nonsuit is proper, yet if the evidence on the part of the defendant is very greatly preponderating, and especially where that preponderance arises from facts and circumstances not controverted, the Court will set aside a verdict for the plaintiff as against evidence. *Kinsman v. The*

New York Mutual Insurance Company,460

2. A verdict against a railroad company will be set aside as contrary to evidence, where it appears by uncontradicted testimony that the act charged to be negligent was done according to the practice of the defendant and other companies for many years with safety, and was considered by those engaged in such business proper and discreet. *Weldon v. Harlem Railroad Company*,576

VOLUNTARY PAYMENT.

Vide Action, 11, 12.



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Vide NEGLIGENCE, 5, 6.
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